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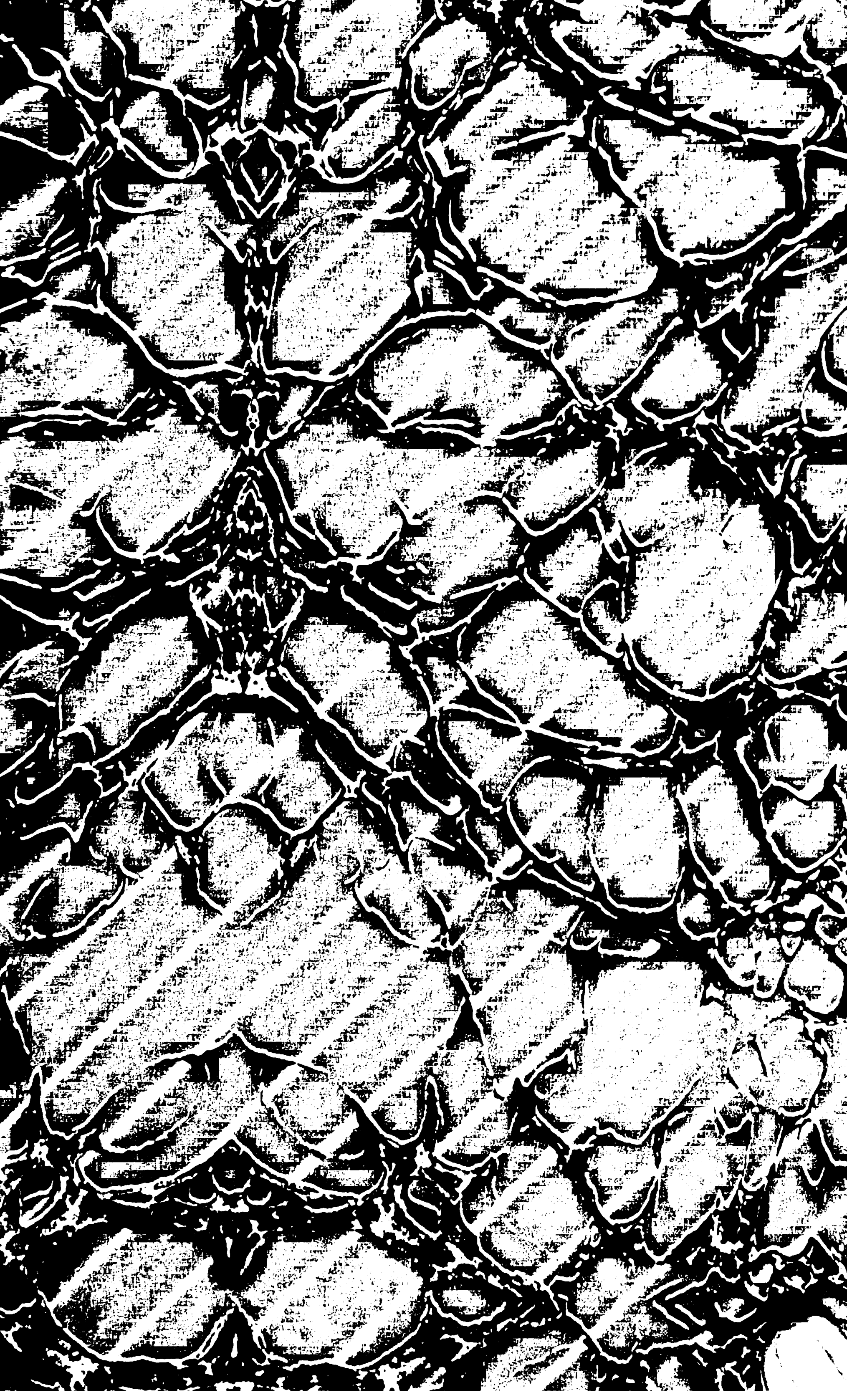
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A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

By WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE FOURTH.

CONTAINING

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33. PRIVATE ACT.
34. KING'S GRANT.

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1

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OF THE

FOURTH VOLUME.

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A
D I G E S T
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

TITLE XXXII.

D E E D.

CHAP. I.

Of the Origin and Nature of Deeds.

CHAP. II.

Of the Circumstances necessary to a Deed.

CHAP. III.

Of the formal and orderly Parts of a Deed.

CHAP. IV.

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Of Feoffment, Gift, and Grant.

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Of Registering and Inrolling Deeds.

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CHAP. I.

Of the Origin and Nature of Deeds.

§ 1. Alienation of Land.	§ 18. Of a Deed or Charter.
8. Statute of Quia Emptores.	23. Deed Poll.
12. Fines for Alienation.	24. Indenture.
16. Different Kinds of Assurances.	26. Of an Article or Agreement.

Section 1.

IT is admitted by all our legal writers that an unlimited power of alienation existed in England in the time of the Saxons, but upon the settlement of the Normans, and the establishment of the feudal law, all landed property became unalienable; and dur-

Alienation of
Lands.

Wright's
Ten. 154.

ing the reign of *William* the Conqueror, and that of his sons, the doctrine of nonalienation was, for various reasons, strictly enforced. The greater part of the landed property of the kingdom had been distributed among the *Norman* barons, as strict and pure feuds, upon condition of military service; and as a considerable jealousy prevailed against all those who were of *Saxon* origin, lest they should attempt to reinstate themselves in their ancient possessions, great care was taken during that period, that all the vassals of the crown, who could alone be depended on, in case of any insurrection, should be in a situation to perform their military services.

§ 2. The first step towards a liberty of alienation was that by which the tenant was permitted to alien with the consent of his lord. This rule was adopted from the maxims which then prevailed on the Continent, and gave rise to fines for alienation. But in *England* the tenant could not dispose of his land, even with the consent of his lord, unless he had also obtained the consent of his next heir; and therefore it was very usual, in ancient feoffments to express that the alienation was made with the consent of the feoffor's heir, and sometimes for the heir to join in the feoffment.

Glanv. lib. 7.
c. 1.
Wright 167.
Madox Form.
Nº 316.

§ 3. The power of alienation was further extended by a law of *Hen. 1. c. 70.* which allowed a man to dispose of lands purchased by himself.—*Emptiones vero, vel deinceps acquisitiones suas det cui magis velit;*

Wilkins 266.

fi

fi Bocland habeat, quam ei parentes sui dederunt, non mittat eum extra cognationem suam.

§ 4. *Glanville* has given us a very circumstantial account of the law, as it stood in the reign of *Hen. 2.* respecting alienation, from which it appears that the power of disposing of lands was then considerably enlarged; and a right of alienation seems to have been soon after extended to all lands which a person had himself acquired, provided they had been conveyed to him and his assigns; and also to one-fourth of all lands acquired by descent, without the consent of the heir.

Lib. 7. c. 1.

Horne Mir.
11.

§ 5. This extensive power of alienation produced a grievance which was much complained of in those days; the king's greater barons who had a large extent of territory, held under the crown, had frequently granted out smaller manors, to inferior persons, to be held of themselves. In imitation whereof, those inferior lords began to carve out and grant to others still more minute estates, to be held of themselves; and were so proceeding downwards *in infinitum*, till the superior lords observed that by this method of subinfeudation, they lost all their feudal profits, their wardships, marriages, escheats, &c. which fell into the hands of these mesne or middle lords. Besides, the mesne lords were by this means less able to perform their military services.

§ 6. This caused an article to be inserted in the *Magna Charta* of *Hen. 3. c. 32.* by which the sub-

infeudation of part of the land was prohibited, unless sufficient was left to answer the services due to the superior lord.—*Nullus liber homo det de cetero amplius alicui, vel vendat alicui de terra sua, quam ut de residuo terræ suæ possit sufficienter fieri domino feodi servitium ei debitum, quod pertinet ad feodum illud.*

Ten. 158.

§ 7. Sir *Martin Wright* observes that the words *de cetero* in this statute, do not suppose that the tenant might before have lawfully aliened or given the whole of his land to hold of himself, because then this chapter, prohibiting it for the future would have been a restraint upon the tenant's liberty at common law. But they plainly suppose such gifts or alienations to have been unlawful, which are therefore restrained merely in confirmation of the common law.

Statute
of Quia
Emptores.

§ 8. Hitherto the right of alienation was confined to subinfeudations conformably to the principles of the feudal law. But in 18 *Edw. 1.* an act was made called the statute of *Quia Emptores Terrarum*, which, reciting the inconvenience of feoffments, to hold of the feoffors and not of the superior lords, enacted—*Quod de cetero liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere. Ita tamen quod feoffatus teneat terram illam seu tenementum illud, de capitali domino feodi illius, per eadem servitia et consuetudines, per quæ, feoffator suus illa prius tenuit.*

Wright 161.

§ 9. This statute took from the tenants of common lords the feudal liberty they claimed of disposing of
part

part of their lands to hold of themselves, and instead of it, gave them a general liberty to sell all or any part, to hold of the next immediate lord ; for that is the sense of the words *de capitali domino*, which they could not have done before, without the consent of the lord. 2 Inst. 501.

§ 10. Neither *Magna Charta* nor the statute of *Quia Emptores*, extended to the King's immediate tenants ; who seem to have been so strictly restrained from alienation, that they were not permitted to dispose of their lands, even to their eldest sons.

§ 11. Thus it appears from the Rolls of Parliament that in 18 *Edw.* 1. *Gilbert de Humfravill* petitioned the king for licence to enfeoff his eldest son and his wife of the manor of *Overton*, to hold of the said *Gilbert* during his life, and, after his death, of the chief lord by the usual services. To which the king answered—*Rex non vult aliquem medium, et ideo non concessit.* Vol. 1. 54. N^o 101.

§ 12. This restraint upon the king's immediate tenants is supposed to have been indirectly removed by the statute *De Prerogativa Regis*, 17 *Edw.* 2. c. 6. But the king's consent being necessary to every alienation of his tenants *in capite*, it became a question whether if such tenant aliened without licence, the land so aliened was not forfeited, or whether the king should only seize it by way of distress, until a fine should be paid for the contempt ; but this question was settled by the statute 1 *Edw.* 3. c. 12. by which it Fines for Alienation. Wright 165

it was enacted, that in all cases of alienations by tenants *in capite*, the king should not hold the land as forfeited, but should have a reasonable fine in the Chancery, to be levied by due process.

Wright 166.

§ 13. It remained much longer a question whether the king's tenants might have aliened any part of their lands, to hold of themselves, as the tenants of common lords might before the statute *Quia Emptores*: But such alienations, made by tenants who held of *Hen. 3.* or other kings before him, were at length made good by the statute 34 *Edw. 3.* c. 15. saving to the king his prerogative of the time of his grandfather, father, and of his own time.

Wright 167.

2 Inst. 67.

§ 14. It is extremely doubtful what prerogative is here saved to the crown; but it is perfectly clear that fines for alienation were established by the statute 1 *Edw. 3.* and after this act Lord Coke says, writs of *quo titulo ingressus est* issued from the office of the Remembrancer of the Exchequer, to help the king to his reasonable fine; whereupon the feoffee was driven to plead, to his great charge and trouble; and therefore, upon conference with the king's officers and the judges, it was ordained that, seeing the king's tenant could not alien without licence, for if he did he should pay a fine; that for a licence to be obtained, the king should have a third part of the value of the land, which was holden reasonable. And if the alienation was without licence, then a reasonable fine by the statute was to be paid by the alienee, which they resolved to be one year's value.

§ 15. Thus

§ 15. Thus continued the law until the abolition of military tenures by the statute 12 Cha. 2. c. 24. which converted all the ancient tenures into free and common socage; and took away all fines for § 1. alienation, seizures, and pardons for alienation, and all incidents thereto; saving fines for alienation due by particular custom of particular manors, other than § 6. fines for alienation of lands and tenements holden immediately of the king *in capite*.

§ 16. With respect to the different modes of alienation, or rather the legal evidences of the transfer of real property, they are called the common assurances of the realm, whereby every man's estate is affured to him, and all controversies, doubts, and difficulties, are either prevented or removed. Different Kinds of Assurances. 2 Comm. 294.

§ 17. There are four kinds of common assurances by which lands may be aliened. 1° Deeds or matters in *pais*, which are assurances transacted between two or more private persons in *pais*; in the country, that is, (according to the old common law) upon the very spot or piece of land to be transferred. 2° Matters of record or assurances transacted only in the king's public courts of record. 3° Assurances deriving their effect from special custom, obtaining in some particular places and relating only to some particular species of property. 4° A devise contained in a person's last will and testament; which does not take effect until after his death.

§ 18. A deed

Of a Deed or
Charter.

1 Inst. 35 b.

§ 18. A deed is a writing on parchment or paper, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things therein contained. It is sometimes called a charter, *charta*, from its materials, but most usually, when applied to the transactions of private persons, it is called a deed, in Latin *factum*, because it is the most solemn and authentic act that a man can perform, in the disposal of his property.

Mad. Form.
Pref.

§ 19. It is probable that every alienation was very soon accompanied with some written evidence, though in the time of the Saxons a legal transfer might be made of lands by certain ceremonies, without any charter or writing. Thus, *Ingulphus*, in his history of the abbey of *Croyland*, says,—“ *Conferebantur*
“ *multa prædia nudo verbo, absque scripto vel charta,*
“ *tantum cum domini gladio, galea, vel cornu, vel*
“ *cratera, et plurima tenementa cum calcari, cum strigili,*
“ *cum arcu, et nonnulla cum sagitta.*”

Mad. Form.
283.

§ 20. Deeds or charters were notwithstanding in use at this time: these were generally called *gewrite* or writings, and the particular deed by which a free estate might be conveyed was called *landboc*, *libellus de terra*, a donation or grant of land, and the land thus granted was called *bockland*.

§ 21. Upon the introduction of the *Norman* customs, the solemn and public delivery of the possession, in imitation of the feudal investiture, became essentially

tially necessary to the transfer of land; and was alone sufficient for that purpose. But as written charters constituted a much better species of evidence of the agreement of the parties, a charter or deed, in imitation of the *Breve Testatum* of the feudal law, was usually prepared, and executed: and was delivered to the purchaser at the same time with the land.

§ 22. The increase of commerce and wealth having introduced a greater degree of refinement in manners, agreements and conveyances became more complex, which produced an universal practice of reducing them into writing. But still lands might have been transferred by a verbal contract only, provided it was attended with a solemn and public delivery of the possession, until the latter end of the reign of *Cha. 2.*

§ 23. Deeds are divided into two sorts, deeds poll, and deeds indented. A deed poll is not strictly speaking an agreement between two persons; but a declaration of some one particular person. Thus a feoffment from *A.* to *B.* by deed poll, is not an agreement between *A.* and *B.*, but rather a declaration by *A.* addressed to all mankind, informing them that he thereby enfeoffs *B.* of certain lands therein mentioned. It was formerly called *charta de una parte*, and usually begins thus—*Sciant præsentēs et futuri quod ego A. &c. &c.*—Know all men by these presents that I. *A.* have granted and enfeoffed, &c. &c.

Deed Poll.

Lit. f. 370.

§ 24. An indenture is a mutual agreement between two or more persons, whereof each party has a copy.

Formerly,

Indenture.

Lit. f. 370.

1. 2.

1 Inst. 220 a.
n. 1.

Formerly, when deeds were more concise than they are at present, it was usual to write both parts on the same skin of parchment, with some words or letters of the alphabet written between them, through which the parchment was cut in acute angles, *instar dentium*, from which they acquired the name of indentures or deeds indented, in such a manner as to leave half the word on one part, and half on the other.

§ 25. In the case of an indenture there ought regularly to be as many copies of it, as there are parties, and when the several parts are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counter-parts: though of late it is most frequent for all the parties to execute every part, which renders them all originals. But a counter-part of a deed has been admitted to be sufficient evidence of such deed; and a conveyance decreed accordingly.

Eyton v.
Eyton.
Prec. in Cha.
116.

Of an Article
or Agreement.

§ 26. It is a common practice for persons to enter into an article or agreement preparatory to the execution of a formal deed, whereby it is stipulated that one of the parties shall convey to the other, certain lands or hereditaments, or release his right to them, or execute some other deed respecting them.

§ 27. An article is therefore considered as a memorandum or minute of an agreement to make some future disposition or modification of real property.

TITLE XXXII.

D E E D.

CHAP. II.

Of the Circumstances necessary to a Deed.

- | | |
|---|---|
| <p>§ 2. <i>Sufficient Parties.</i>
 4. <i>Who may convey by Deed.</i>
 5. <i>The King and Queen.</i>
 7. <i>Corporations.</i>
 8. <i>Of Deeds by Infants.</i>
 12. <i>Marriage Contracts by Female Infants.</i>
 16. <i>By Male Infants.</i>
 18. <i>Infant Trustees may convey.</i>
 19. <i>Idiots and Lunatics.</i>
 22. <i>Married Women.</i>
 27. <i>Persons attainted.</i></p> | <p>§ 28. <i>Who may be Grantees.</i>
 32. <i>Conveyances to Charitable Uses.</i>
 35. <i>Consideration.</i>
 41. <i>Writing on Parchment or Paper.</i>
 45. <i>Stamps.</i>
 46. <i>Reading.</i>
 47. <i>Sealing and Signing.</i>
 49. <i>Delivery.</i>
 60. <i>Attestation.</i></p> |
|---|---|

Section 1.

WHEN it became usual to reduce all agreements into writing, the following circumstances were deemed necessary to a deed. 1° Sufficient parties, and a proper subject matter. 2° A good and sufficient consideration. 3° Writing on paper or parchment duly stamped. 4° Words sufficient to specify the agreement, and bind the parties, legally and orderly set forth. 5° Reading if desired. 6° Sealing and signing. 7° Delivery. 8° Attestation by witnesses.

§ 2. The first requisite to a valid deed is, that there be persons able to contract, and be contracted with, for the purposes intended by the deed; and also

Sufficient
Parties.

also a thing or subject matter to be contracted for. So that in every deed there must necessarily be a grantor, a grantee, and a thing granted.

§ 3. All those who have any estate, right, title, or interest, either at law, or in equity, in that which is the subject matter of a deed, must necessarily be parties to it, otherwise their estate or interest will remain in them; and all those who are intended to take an immediate estate or interest under a deed, must also be parties to it: but a person may take
 1 Inst. 231 a. an estate in remainder by a deed to which he is not a party.

Who may
convey by
Deed.

§ 4. With respect to the persons who are capable of conveying, it may be laid down as a general rule that all those who have attained the age of twenty-one years, and are of sound mind and understanding, and not under the power of others, may be parties to and bind themselves by deed.

The King
and Queen.

Tit. 34.

§ 5. The king had formerly a power of alienating the crown lands for ever. But this prerogative has been restrained by several modern statutes of which an account will be given hereafter.

1 Inst. 3 a.

§ 6. The queen consort is considered by the common law as a feme sole, and may therefore be a party to any species of deed, without the king.

Corporations.

§ 7. Although a corporation aggregate is said to be invisible, immortal, and to exist only in supposition
 of

of law, yet such an artificial body is capable, by its creation, of being party to a deed, and in many cases of acquiring or conveying away real property by deed. A corporation sole, as a bishop or parson, may also be a party to a deed. But a dean without his chapter, a mayor without his commonalty, or the master of a college without his fellows, cannot by executing a deed, bind the corporation.

§ 8. All contracts or agreements made by an infant, from which no apparent benefit can arise to him, are absolutely void. But as to those contracts from which the infant may derive some benefit, and which are entered into with more solemnity, they are only voidable, that is, the law allows the infant when he comes of age, either to ratify and confirm, or else to void them.

Of Deeds by Infants.

3 Mod. 310.

§ 9. Whatever an infant is bound and compellable to do at law, the same shall bind him although he does it without a suit. And therefore where an infant conveyed lands which had been mortgaged to his father (the mortgage money having been paid off) to a new mortgagee, it was held to be good.

§ 10. *John Bicknell* conveyed the lands in question to *William Cooke* and his heirs by way of mortgage. *W. Cooke* afterwards died leaving *J. L. Cooke* an infant, his heir and his widow joint executors. The mortgage money was paid off, and the infant and his mother conveyed the mortgaged premises to a new mortgagee. It was resolved that the infant was bound

Zouch v. Parsons,
3 Burr. 1794.

by

by this conveyance, because it could never operate to his prejudice, and that he was compellable to convey.

§ 11. By the statute 17 Geo. 3. c. 26. § 6. It is enacted, that all contracts for the purchase of any annuity with an infant shall be utterly void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years, notwithstanding.

Marriage
Contracts by
Female
Infants.

§ 12. Contracts entered into by female infants in consideration of marriage are more favoured than any others; a female being capable of contracting marriage long before the age of twenty-one, she ought to be permitted to bind herself by the other parts of the contract: for as soon as the marriage is had, the principal contract is executed, and cannot be set aside; the estate and capacities of the parties are altered, the children born of the marriage become interested: and therefore it has been truly said that marriage contracts ought not to be rescinded, because the interests of third persons would be affected.

Cannell v.
Buckle,
2 P. Wms.
243.

§ 13. Lord *Macclesfield* has said, that if a female infant on a marriage, with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband. If this were done in consideration of a competent settlement, equity would execute the agreement, although no action would lie at law to recover damages.

Lord

Lord *Hardwicke*, after citing this passage, says—
 “ This is going a great way, as it related to the inhe-
 “ ritage of the wife, but yet there are cases where
 “ the court will do it, as if the lands of the wife
 “ were no more than an adequate consideration for
 “ the settlement that the husband makes, and after
 “ the marriage the wife should die, and leave issue,
 “ who would be entitled to portions, provided for
 “ them by the settlement; it would in that case be
 “ very reasonable to affirm that settlement.”

Harvey v.
Ashl-y,
3 Ask. 615.

§ 14. This doctrine has been denied by Lord
Thurlow; who, in a case where a bill was filed for a
 specific execution of articles, entered into by a female
 infant, respecting her real estate, previous to and in
 consideration of her marriage, said—“ To decree a
 “ specific performance of the articles, the court must
 “ carry the principle to this length, that a wife making
 “ a wife settlement in her infancy, on the marriage,
 “ without any estate settled on the other side, is
 “ bound by the agreement; and that even if the
 “ husband had died, she must have been bound. I
 “ cannot think an infant only covenanting as to her
 “ estate can be bound. If she is so at all, it must be
 “ in reference to her marriage. No body has yet
 “ said that merely by its being upon marriage, she is
 “ bound; but it is said that upon a competent settle-
 “ ment she would be bound. I think the court
 “ should not go into the competence of the settlement.
 “ I must lay down that every settlement shall be con-
 “ sidered as good, till shewn to be fraudulent. The
 “ cases have not gone so far, nor does my opinion.

Darnford v.
Lanc,
1 Bro. R. 106.

Ante f. 13.

“ If she had a settlement from her husband, and after
 “ his death she had had taken possession of it, I think
 “ she would be bound by the equity arising from her
 “ own act. I say this, in deference to *Cannell v.*
 “ *Buckle*, and *Harvey v. Ashley*. I think she is not
 “ bound, unless she has availed herself of the settle-
 “ ment of the husband. In this opinion I cannot say
 “ the whole property is bound, or decree the articles
 “ to be specifically performed.”

§ 15. Lord *Thurlow* fully confirmed this opinion by his decree on a subsequent case.

Clough v.
 Clough,
 3 Woodeson,
 453. note.
 4 Bro. R. 510.

A bill was brought on behalf of the infant children of the marriage, after the husband's death, against his widow, praying that marriage articles might be established, and specifically performed, entered into before marriage, by *Patty Clough* the widow, while an infant, and her guardian, for settling her estate, and lands of the husband, as therein mentioned. She by her answer insisted, that she had done nothing after her full age, affirming the articles, and that her estates were not thereby bound; waiving any right under the same in lands of her late husband. The decree declared that her estate was not bound by the marriage articles, and dismissed the bill without costs.*

* It is held that a female infant may enter into an agreement before marriage respecting her personal estate, which will bind her; for such agreement must be in some way beneficial to her, as otherwise her husband would be entitled to it, 3 *Ash. R.* 613. *sed vide* 1 *Bro. R.* 111.

§ 16. Though a male infant cannot bind his estate, yet where a male infant married an adult, who covenanted that her estate should be limited to certain uses, he was held to be bound by such covenant.

By Male
Infants.

§ 17. A male infant married an adult female, who covenanted that her estate should be settled to certain uses. Upon a bill filed by the trustees of the settlement, to have it carried into execution by the husband and wife, the husband insisted that being an infant when he executed the settlement, he was not bound by it.

Sherburn v.
Gibbs,
2 Bro. R. 545.

Lord *Thurlow* said, if a woman before marriage conveys her property, and agrees to settle her general expectations, when they shall fall in, and this be done without any fraud upon the intended husband, such an agreement must be executed, and the husband, when of age, must answer her contract. I think, therefore, in this case, it is not necessary to discuss the other question, how far the infant husband could be bound by his own contract, for I go upon the covenant of the wife, who was adult. And the husband's covenant operates no more than to shew his concurrence, and to take away every imputation of fraud from the transaction.

§ 18. By the statute 7 *Ann.* c. 19. it is enacted, that all infant trustees and mortgagees shall be compellable to make such conveyances and assurances as the court of chancery or exchequer shall direct,

Infant
Trustees may
convey.

which shall be as good and effectual in law, as if the said infants were of full age.

Idiots and
Lunatics.

2 Com. 291.

§ 19. Idiots and lunatics are not totally disabled from conveying their lands by deed, for, by the common law, neither an idiot nor lunatic could avoid his own deed. But the heir of an idiot or lunatic may avoid a deed executed by him, by pleading his disability.

Tit. 16. ch. 6.
f. 7.

§ 20. The mere execution of a deed by an idiot or lunatic is absolutely void, as against his heir. But, if an idiot or lunatic makes a feoffment, and delivers seisin in person, it is only voidable.

Infra, ch. 6.

§ 21. By the statute 4 Geo. 2. c. 10. idiots, lunatics, and persons *non compos mentis*, or their committees, being trustees or mortgagees, are compellable to convey under the direction of the court of chancery. And all such conveyances are declared to be good and valid.

Married
Women.

§ 22. All deeds executed by married women, (except a queen consort), for the purpose of conveying away their estates, are absolutely void at law, and not voidable only.

§ 23. The acknowledgment of a deed, executed by a woman during coverture, after the death of her husband, may, in some cases, amount to a re-delivery of it, and so render it valid.

§ 24. A man

§ 24. A man and his wife being entitled to the reversion of a house, in right of the wife, by deed, executed by the husband and wife, conveyed it to a person by way of mortgage. After the death of the husband, the wife, by three different papers under her hand, acknowledged the mortgage. It was held, that these papers were equivalent to a re-delivery of the deed.

Goodright
v. Straphan,
Cowp.K.201.

§ 25. A wife may, without her husband, execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture. The rule is the same, where both an interest and an authority pass to the wife, if the authority is collateral to, and doth not flow from the interest: because, then, the two are as unconnected, as if they were vested in different persons. A married woman may also convey lands, in performance of a condition, where land is vested in her on condition to convey to others.

1 Inst. 112 a.
n. 6.

Vide Goodill
v. Brigham,
1 Bosan. &
Pul. R. 192.

A power to convey lands is now frequently given to married women, by means of a conveyance to uses; of which, an account will be given in a subsequent Chapter.

§ 26. If a husband abjures the realm, or is banished, he is thereby become *civiliter mortuus*, and his wife is considered as a feme sole, and may act in all things as if her husband were naturally dead.

1 Inst. 132 b.
Newsome v.
Bowyer,
3 P. Wms 37.

Persons attainted.
1 Inst. 42 b.

§ 27. Persons attainted of treason, felony, or *præmunire*, are incapable of conveying away their estates, from the time when the offence was committed, provided an attainder follows. For any conveyances by them may tend to defeat the king of his forfeiture, and the lord of his escheat.

Who may be Grantees.

1 Inst. 2 b.

§ 28. By the common law, all persons whatever may be grantees in a deed, because it is supposed to be for their benefit. Thus, an infant may be a purchaser in a deed, and, at his full age, he may either agree, or disagree to it; and so may his heirs, if he did not agree to it at his full age.

1 Inst. 3 a.

§ 29. An estate may also be conveyed to a married woman, without the consent of her husband; and the conveyance is good, unless the husband avoids it. But, though he consents to it, yet the wife may, after his death, waive it. And if she dies before her husband, or if she does not assent to it, during her widowhood, her heir may avoid it.

1 Inst. 3 a.
2. 1. 112 a.

§ 30. Although a wife cannot be the immediate grantee of her husband, yet she may take an estate from him, through the medium of a trustee.

1 Inst. 2 b.

§ 31. An alien may be grantee in a deed, though he cannot hold it; for, upon office found, the king shall have it by his prerogative.

§ 32. In

§ 32. In consequence of the several statutes against mortmain, ecclesiastical corporations have, for a long time, been incapable of taking lands and tenements by deed: but, as these statutes did not extend to charitable uses, lands might still be given for the maintenance of a school, an hospital, or any other use of that nature.

Conveyances
to charitable
Uses.

§ 33. It was, however, apprehended, that persons, on their death-beds, might make large and improvident dispositions, even for those good purposes, and defeat the political ends of the statutes of mortmain. It is therefore enacted by the statute 9 Geo. 2. c. 36., that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any charitable use whatsoever, unless by deed indented, executed in the presence of two witnesses twelve months before the death of the donor, and inrolled in the court of chancery within six months after its execution: and unless such gift be made to take effect immediately, and be without power of revocation; and that all other gifts shall be void.

§ 34. The two universities, their colleges, and scholars upon the foundations of the colleges of *Eton*, *Winchester*, and *Westminster*, are excepted out of this act; with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows and students upon their respective foundations.

Considera-
tion.

§ 35. The second requisite to a deed is a good and sufficient consideration.

Plowd. 308.
3 Burr. 1670.

By the common law, it is not absolutely necessary that any consideration should be expressed in a deed: for, although a verbal contract is not binding without a consideration, because words often pass from men lightly and inconsiderately, which may justify a suspicion of imprudence, and even of fraud; yet, where an agreement is made by deed, which must necessarily be attended with more thought and deliberation, all suspicion of surprise or deceit is excluded; and, therefore, it will be valid without any consideration.

Tit. 11. c. 3.
s. 24.

§ 36. Soon after the chancellors had assumed a jurisdiction in cases of uses, they adopted the maxim of the civil law, *ex nudo pacto non oritur actio*. And, in conformity to it, they determined not to lend their aid to carry any deed into execution, unless it was supported by some consideration.

Treat. of
Eq. B. 1. c. 5.
s. 1.

§ 37. There are two kinds of considerations, civil and moral. The first, which is usually called a valuable consideration, is money, or any other thing that bears a known value. Marriage, also, forms a valuable consideration.

Idem.

§ 38. The second, which is called a good consideration, arises from an implied obligation, such as that which subsists between a parent and child: for children

children are considered, in equity, as creditors claiming a debt, founded upon the moral obligation of the parent to provide for his child.

The love and affection which a man is naturally supposed to bear to his brothers and sisters, nephews, and nieces, and heirs at law, and the desire of preferring his name and family, are also held to be good considerations.

§ 39. The payment of a man's debts is also deemed a good consideration ; as every man is under a moral obligation of satisfying his lawful creditors.

§ 40. By the statute 13 *Eliz. c. 5.* all deeds which are not founded on a valuable consideration, shall be deemed fraudulent and void, as against creditors. And by the statute 27 *Eliz. c. 4.*, all deeds which are not founded on a valuable consideration, shall also be deemed fraudulent, as against subsequent purchasers.

The cases which have arisen on these statutes, will be stated in a subsequent chapter.

§ 41. The third requisite to a deed is, that it be written or printed, although it may be in any language or character whatever ; but it must be written on paper or parchment ; for, if it be written on stone, board, linen, leather, or the like, it is no deed. Wood and stone may be more durable, and linen less liable to erasures ; but writing on paper or parchment unites

Writing on
Parchment or
Paper.

1 Inst. 229 a.
2 Com. 297.

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unites in itself, more perfectly, than in any other way, both these desirable qualities; for there is nothing else so durable, and, at the same time, so little liable to alterations.

Shep. Tou.
§ 4.
Perk. f. 118.

§ 42. All the matter and forms of a deed must be written before the sealing and delivery of it. For, if a man seals and delivers an empty piece of parchment or paper, though he, at the same time, gives directions that an agreement shall be written above, which is accordingly done, yet it will be void as a deed.

Shep. T. 55.

§ 43. An alteration, erasure, or interlining, made in any part of the deed before it is delivered, will not hurt the deed: but, in such cases, it is right to mention it in the attestation.

Vide infra.

Paget v.
Paget,
2 Rep. in Cha.
187.

§ 44. A deed of revocation, and a new settlement made by that deed, though, after the sealing and execution thereof blanks were filled up, and not read again to the party, nor re-sealed and executed, was yet held a good deed.

Stamps.

Fearne's Post.
Works, 111.

§ 45. A deed must also have the regular stamps required by the several statutes for the increase of the public revenue, otherwise it cannot be given in evidence. It should, however, be observed, that the laws which require all deeds to be stamped, do not prevent their legal effect and operation, but only suspend their being pleaded, or given in evidence, in any court, until they are properly stamped. The omission of the stamps,

stamps, in the first instance, is therefore immaterial, if the deed be afterwards duly stamped.

§ 46. A deed must be read whenever any of the parties require it; if not, the deed will be void as to the party requiring it to be read. If a person can, he should read it himself; and if he be blind or illiterate, some other should read it for him. If it be read falsely, it will be void; at least for so much as was misread; unless it be agreed by collusion that the deed should be read false, on purpose to make it void: for, in such a case, it will bind the fraudulent party.

Reading.

Manser's Case, 2 Rep. 3. Thowroughgood's Case, id. 9.

§ 47. It is absolutely necessary that the party whose deed it is should seal, and, in most cases, sign it also: for it is enacted by the statute of frauds and perjuries, 29 *Cha. 2, c. 3.* that all leases, estates, interests of freehold or terms for years, or any uncertain interest in or out of lands or tenements, not put in writing and signed by the parties making them, or their agents authorized by writing, shall have no greater effect than as estates at will; except leases not exceeding three years from the making thereof, whereupon the rent reserved shall be two-thirds at least of the full improved value of the thing demised: and no such estates or uncertain interests, not being copyhold, &c. shall be assigned, granted, or surrendered, unless by deed or note in writing, signed as aforesaid, or by act and operation in law,

Sealing and signing.

Farmer v. Rogers, 2 Will. R. 26.

§ 48. A person

Frontin v.
Small,
Sta. R. 705.

§ 48. A person may appoint another to be his attorney to execute a deed for him. But, in such a case, it must be executed in the name of the principal.

Delivery.

Goddard's
Case, 2 Rep.
4.

§ 49. The seventh requisite to a good deed, is, that it be delivered by the party himself, or by his certain attorney. For a deed takes effect only from its delivery; and if the date be a false or impossible one, the delivery ascertains the time from which the deed takes effect.

Perk. f. 130.

2 Com. 307.

§ 50. If another person seals the deed, yet if the party delivers it, he thereby adopts the sealing, and, (says Sir *W. Blackstone*), by a parity of reason, the signing also, and makes them both his own.

1 Inst. 36 a.
n. 6.
Thowrough-
good's Case,
9 Rep. 136.

§ 51. The usual mode of delivering a deed, is to take it up and say, "I deliver this as my act and deed." But a deed may be delivered to the party without words; so a deed may be delivered by words, without any act of delivery: as, if the writing sealed lies upon the table, and the feoffor says to the feoffee, Go and take up the said writing, it is sufficient for you, or it will serve the turn; or take it as my deed, or the like words, it is a sufficient delivery.

Shep. T. 57.

§ 52. A deed may be delivered to the party himself to whom it is made, or to any other person, by sufficient authority from him; or it may be delivered to any stranger, for and on behalf, and to the use of him
to

to whom it is made, without authority. But if it be delivered to a stranger, without any such declaration, it seems it will not be a sufficient delivery.

§ 53. A deed cannot be delivered twice; for, if the first delivery has any effect, the second will be void. Thus, if an infant, or a person under duress of imprisonment, delivers a deed, (in which case, the deed is not void, but only voidable), and after, the infant being of full age, or the person who was under duress, being at large, do deliver the deed again, such second delivery is void. But where a feme covert seals and delivers a deed, and, after her husband's death, delivers it again, the second delivery is good, because the first was void. Shep. T. 60.
Ante, f. 246

§ 54. The delivery of a deed may be either absolute, that is, to the grantee, or to some person for him; or conditional, that is, to a third person, to keep it until something is done by the grantee; in which last case, it is not delivered as a deed, but as an escrow, that is, a scrowl or writing, which is not to take effect until the condition is performed; and then it becomes a deed to all intents and purposes. 1 Inst. 36 a.

§ 55. Where a deed is delivered as an escrow, it is of no force until the condition is performed; and, although the party to whom it is made should get it into his possession, before the condition is performed, yet he can derive no benefit from it. And if either of the parties should die before the condition is performed, Shep. T. 99.
and

and afterwards the condition is performed, the deed is good, and will take effect from the first delivery : for there was *traditio inchoata* in the life-time of the parties ; *et postea consummatio existens*, by the performance of the condition.

Shep. T. 58.

§ 56. In the delivery of a deed as an escrow, two things must be attended to. 1st, That the form of words used in the delivery of the deed, as an escrow, be apt and proper : 2d, That the deed be delivered to a stranger, and not to the party himself, to whom it is made.

Idem.

§ 57. The words to be used in the delivery of a deed as an escrow, are these : “ I deliver this to you : “ as an escrow to deliver to the party as my deed, “ upon condition that he deliver to you the sum of “ 20 l. for me ; ” or upon any other condition then mentioned.

3 Inst. 36 a.
9 Rep. 137 a.

§ 58. It is also absolutely necessary that the delivery of a deed as an escrow be to a stranger : for, if a person delivers a deed to the party himself to whom it is made, as an escrow, upon certain conditions ; the delivery is absolute, and the deed will take effect immediately. Nor will the party to whom it is delivered be bound to perform the conditions.

§ 59. In the case of the king's letters patent, or of grants under the seal of the Duchy of *Lancaster*, the seal is matter of record, and, therefore, the deed needs

no delivery. The deed of a corporation, to which their seal is affixed, need not, in general, be delivered.

Willis v. Jermin, Cro. Eliz. 167.

§ 60. The last requisite to a deed, is the attestation of it by witnesses, which is not a circumstance essential to the deed itself, but only constitutes the evidence of its authenticity.

Attestation.

TITLE XXXII.

D E E D.

CHAP. III.

Of the Form and orderly Parts of a Deed.

§ 4. <i>The Premises.</i>	§ 45. <i>Clause respecting Deeds.</i>
5. <i>The Date.</i>	48. <i>Exception.</i>
9. <i>Parties Names, &c.</i>	50. <i>Habendum.</i>
20. <i>Recital.</i>	52. <i>Tenendum.</i>
22. <i>Consideration.</i>	53. <i>Reddendum.</i>
24. <i>Grant.</i>	54. <i>Condition.</i>
25. <i>Description of Things granted.</i>	

Section 1.

THE subject matter of a deed must be legally and orderly set forth, that is, there must be words sufficient to specify the terms and conditions of the agreement, and to bind the parties; which sufficiency must be left to the courts of law to determine.

1 Inst. 6 a.

§ 2. Antient deeds and charters were extremely short, and suited to the simplicity of the times: but, when deeds grew more complicated, it became customary to divide them into several formal parts. And although it is not absolutely necessary that a deed should be divided in this manner, provided there are sufficient words to shew the meaning and intention of the parties yet, as these formal and orderly parts are calculated to convey that meaning, in the clearest, most distinct,

distinct, and effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them, without good reason or urgent necessity.

§ 3. These formal and orderly parts are, 1st, The Premises. 2d, The Habendum. 3d, The Tenendum. 4th, The Reddendum. 5th, The Condition. 6th, The Warranty. 7th, The Covenants: and, 8th, The Conclusion. Idem;

§ 4. The premises of a deed contain all that part which precedes the *habendum*, that is, the date, the parties names and descriptions, the recital, the consideration and receipt thereof, the grant, the description of the things granted, and the exception, if any. The Premises.

§ 5. The date of a deed is the description of the time when it was made, by inserting the day of the month, the year of the king's reign, and the year of our Lord; it may be placed at the beginning or at the end of a deed. It is now usually placed at the beginning of deeds indented, and at the end of deeds poll. The Date.

§ 6. In former times, deeds were not dated, because the limitation of prescription or time of memory often changed; and then it was held for law, that a deed bearing date before the limited time of prescription was not pleadable. But it became customary about the time of *Edw. 2.* and *3.*, to insert the date in all deeds, which has been practised ever since. 1 Inst. 6 a.

Ch. 2. f. .
Cromwell v.
Grunden,
2 Salk. 462.

§ 7. It is not, however, absolutely necessary, that a deed should be dated ; for, as has been already observed, if a deed has no date, or bears an impossible date, it will take effect from the time of its delivery.

Taylor v.
Horde,
1 Burr. 106.

§ 8. If two deeds bear the same date, and manifestly contain but one agreement, that deed shall be presumed to have been first executed, which will best support the clear intention of the parties.

Parties
Names, &c.

§ 9. With respect to the parties to a deed, they are either active or passive. Those who grant, enfeoff, or demise, are the active parties, and are called the grantors, feoffors, or lessors ; and those to whom lands are granted, enfeoffed, or demised, are the passive parties, and are called the grantees, feoffees, or lessees.

§ 10. The parties to a deed ought to be described by their proper christian and surnames, their rank or degree, profession, and place of residence. But mistakes in the description of the parties will not, unless very gross, make a deed void : for if the description, however imperfect, is sufficient to distinguish the person described from all others, it will be good ; *nihil facit error nominis cum de corpore constat*.

1 Inst. 3 a.

§ 11. If, therefore, lands be granted to *Robert Earl of Pembroke*, when his name is *Henry*, or to *George Bishop of Norwich*, when his name is *John*, it will be good : for in these, and the like cases, no doubt or uncertainty can arise, as there can be but one person having those dignities.

§ 12. A wife

§ 12. A wife is also a good name of purchase, with- Idem.
but a christian name : and so it is, if a christian name
be added, and mistaken; for *utile per inutile non*
vitiatur.

§ 13. But if an ordinary person grants by his fir- Idem.
name only, without any name of baptism, or by his
name of baptism without any surname at all, in these,
and such like cases, the deed will be void for uncer-
tainty; unless there be some other matter in the deed
to help it, or something done afterwards to supply this
defect.

§ 14. A name, acquired by reputation only, will be Idem.
considered as a sufficient description of a person : for
all surnames were originally acquired by reputation.
Hence it has been often held, that a bastard is suffi-
ciently described by the name by which he has been
usually known.

§ 15. A person may be described in a deed without Idem.
mentioning either his christian or surname : as, if a grant
be made *primogenito filio*, or *seniori puero* of J. S., it will
be good. And in the usual limitation of remainders
to persons unborn, they are necessarily described in this
manner.

§ 16. The word issue is a good description in a deed, 1 Inst. 28 a.
and is equivalent in its import to the words child, or
children; and, therefore, a grant to the issue, or issue
of the body of A., is good.

§ 17. In consequence of the maxim that *nemo est heres viventis*, an immediate grant to the heirs of *A.*, is void. But a remainder may be limited to the heirs of *A.*, which will be good, in case *A.* dies during the continuance of the particular estate, or at the instant of its determination. And a grant to the heirs of a person who is dead is good ; for, in that case, the word heirs is a sufficient description of the person intended to take.

Tit. 16. c. 1.
f. 16.

Venables v.
Morris,
7 Term R.
342. 438.

1 Inst. 24 a.
n. 3.

Beckford v.
Pendarvis,
5 Bro. Parl.
Ca. 93.

Vide Treat.
of Eq. B. 1.
c. 6. f. 11.

Fanthaw's
Case,
Moo. 235.

§ 18. Lord *Coke* says, if a remainder is limited to the heirs female of the body of *A.*, and *A.* dies leaving a son and a daughter, the daughter can take nothing by this limitation, because she is not heir ; for the person claiming under such a description must fully answer it, and, consequently, a person having only half the description, will be excluded. Now, the description consists of two parts, one, requiring that the donee should be heir, the other, that the donee should be a female ; and, in the case put by Lord *Coke*, the daughter is not heir, she having a brother. This doctrine has been controverted, but is very ably defended by Mr. *Hargrave* in a note to this passage.

§ 19. In conveyances by or to corporations, the description of the corporation must be such as to distinguish it from all other corporations. But there is no case where a grant by a corporation has been held void, on account of any variance in any of these four circumstances, namely, Addition, Interposition, Omission, or Commutation ; if they retain the four first principles of substance, *viz.* name of persons, of house, foundations,

foundations, or dedications, places known before the foundation, in which the house is situated.

§ 20. A recital is a narration of such deeds, agree- Recital.
ments, or facts, as are necessary to explain the nature
of the grantor's title, and the motives and reasons upon
which the deed is founded and entered into : and, al-
though a recital is not absolutely necessary, yet it is
now usually inserted, for the purpose of shewing the
origin and derivation of the title, or of stating some
prior facts which are connected with, or relate to, the
subject matter of the deed.

§ 21. The custom of modern conveyancers is, to re-
cite the title from the last estate in fee-simple, and so
derive it from thence to the person who is to be the
donor or grantor in the deed ; by which means, the
donee or grantee will always know how to make out
his title, even if his title-deeds should happen to be
lost or destroyed, by means of counterparts, wills, and
matters of record ; and it is highly proper that every
deed should contain such recitals as may shew its nature
and object, and the motives which produced it, and
render it unnecessary that other deeds should be con-
sulted for its explanation.

§ 22. After the recital follows an account of the Confidera-
tion.
confideration, and, if it be a pecuniary one, the pay-
ment of it is mentioned, and the grantor acknowledges
the receipt of it, and gives the grantee a release.

After the real consideration is mentioned, it is proper to add these words,—“ And for divers other “ good causes and considerations him the said *A. B.* “ thereunto moving.” Because, where these words are inserted, other considerations besides those mentioned in the deed may be averred.

§ 23. The acknowledgement of the receipt of the consideration money inserted in the deed is sufficient, but the constant practice now is to indorse a receipt for the consideration money on the back of the deed.

Grant.

§ 24. The next thing in the premises of a deed is the grant or release, by which the lands are transferred. The technical words, by which this transfer is made, differ according to the different conveyances which are used for that purpose, and will therefore be more properly considered when the nature of those different conveyances is explained.

Description
of the Things
granted.

§ 25. The grant is immediately followed by the description of the things granted which cannot be too minute and accurate. Every thing intended to be conveyed must be particularly mentioned in the premises, and should be set down in its proper order, such as manors, messuages, farms, lands, tenements, hereditaments, &c. &c. all which should be described by their situation, county, hundred, tithing or vill, bailiwick, hamlet, or parish, number of acres and boundaries, in whose tenure and occupation; and sometimes from whom purchased.

§ 26. The

§ 26. The word manor has a very extensive signification, for it will pass, 1st, All the demesnes, that is, all the lands whereof the lord is seised within the manor, which are in his own occupation, or let out in leases, or held by copyholders, or other customary tenants; together with all the wastes within the manor. 2d, All the services, such as fealty, suit of court, rents, &c. And 3d, All courts leet and courts baron, with the fines and perquisites annexed thereto, and all other franchises that are parcel of, or appendant to the manor, at the time of the conveyance.

§ 27. But things which are not parcel of the manor, will not pass by a conveyance of a manor, unless perhaps they have gotten from time immemorial a reputation of appendancy. *Shep. T. 93.*

§ 28. A grant of a manor with all advowsons, &c. thereunto belonging, will not extend to an advowson severed in ancient times; though it was appendant to the manor three hundred years ago. *Rex v. Episc. Durham, Com. R. 361.*

§ 29. Lands held in fee simple of a manor are not considered as parcel of the manor, although the rents and services issuing out of those lands are parcel of the manor. But where lands which are part of the demesnes of a manor are granted for life only, the reversion remains parcel of the manor and will pass by a conveyance of the manor; for (as Mr. Pigott observes) when a man is seised of a manor and demesnes in possession, and makes a lease for life, and parts with the possession of what he so leases, in lieu of the possession, *Rich v Barker, Hard. R. 131*
1 Inst. 324 b. Pigott Recor. 42.

possession, he has the reversion and services, which are annexed to the manor, and constitute a part of it, and the reversion and services naturally follow the right and nature of the land.

Tit. i. f. 14.

6 Rep. 66 b.
Thinne v.
Thinne,
Sid. 190.
Lev. 28.

§ 30. It has been stated that although many manors have been destroyed, yet they continue to be called manors, though they are only reputed manors; and a reputed manor will pass in a conveyance by the word manor.

Shep. T. 94.

1 Inst. 5 b.

56 b.

Smith v.

Martin,

2 Saund. 400.

31. The word messuage is synonymous with dwelling house. And a grant of a messuage with the appurtenances will not only pass a house, but all buildings attached or adjoining to it; and also its orchard, garden, and curtilage, with the close on which the house is built. But if a greater quantity of land has been usually occupied with such house, still it will not pass.

Shep. T. 93.

§ 32. The word farm comprehends many things; for by a conveyance of a farm will pass a messuage, land, meadow, pasture, wood, &c. thereto belonging, or therewith used: because this word properly signifies a messuage with a quantity of demesnes thereto belonging.

1 Inst. 4 a.

Tit. i. f. 3, 4.

§ 33. The word land, strictly taken, only signifies arable land. But in a larger sense it comprehends any ground, soil, or earth, whatever; and therefore a grant of all lands will pass arable, meadow, pasture, wood, moor, marsh, furze, heath, &c. together with

with all buildings standing thereon, and all mines, minerals, and fossils, under the surface thereof.

§ 34. The word tenement is of still greater extent, 1 Inst. 6 a. and though in its usual acceptation it is only applied to houses, and other buildings; yet in its original proper and legal sense, it signifies every thing that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus the words *liberum tenementum* or frank tenement, are applicable not only to land, but also to rents, commons, offices, and the like.

§ 35. The word hereditament is much the largest Idem 6 a. and most comprehensive expression used in conveyances: for it includes not only lands and tenements, but also whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixt. Thus an heir 3 Atk. 82. loom or piece of furniture, which by custom descends to the heir, together with a house, is neither land nor tenement, but a mere moveable, yet being inheritable, it is comprised under the general word hereditament. And so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

§ 36. A deed will however be good, although the several things comprehended therein be not described by their proper appellations or set down in a regular manner. For if the description be sufficient to shew clearly what was meant and intended to be conveyed; it

Title XXXII. Deed. Ch. iii. § 36—38.

it will not become void on account of any immaterial inaccuracy or mistake.

§ 37. A grant of glebe land and tithes lying in a particular place which was named, which were late in the occupation of *A. B.* (which was not the fact) was held good.

Swift v.
Eyles,
Cro. Car. 546,

§ 38. A corporation demised in these words—All that their glebe lands lying in *Chesterton*, viz. seventy-eight acres of land, and also the demesnes of the said seventy-eight acres, with all profits, commodities, tithes, &c. belonging to the said corporation; and also the tithes of the said seventy-eight acres, all which lately were in the farm or occupation of *Margaret Peto*.

The tithes of the lands never were in the occupation of *Margaret Peto*; and the question was, whether they passed to the lessee.

It was strongly urged for the plaintiff, that those words in the indenture were a clause of restriction, and declared their intent that nothing should pass but what was in the tenure of *Margaret Peto*. But all the Justices held that it was a good grant, and no restriction of the first words, because there are three distinct clauses before, viz. First, the grant of seventy-eight acres of glebe; secondly, the grant of the tithes predial and personal; thirdly, the grant of the tithes of the seventy-eight acres of glebe. This clause “all which, &c.” does not depend upon any of them,
and

and “which were, &c.” is a restriction only when the clause is general, and is all but one and the same sentence, and not ended or certain before the end of the sentence : But where the clause is not in one entire sentence, but distinct and disjoined from the other, as here it is, there cannot be any restriction,

§ 39. If however the thing is not granted by an express name ; a mistake in the description of the person, in whose occupation it is said to be, will make the grant void. 2 Mod. 3.

§ 40. A lease of a yard does not pass a cellar situate under that yard ; and the lessor in an ejectment brought to recover the cellar, is not estopped by his deed, from going into evidence to show that the cellar was not intended to be demised.

§ 41. A lease was made of certain parts of a messuage situate on the west side of *Swallow-street, Westminster*, described to be one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto, and three rooms together with the ground whereon the same stood, together with a *piece of ground* on the north side, particularly describing it, late in the occupation of *A.* there was a cellar under the piece of ground which the defendant claimed, resting his title on the maxim that *cujus est solum ejus est usque ad cælum, &c.*

Doe v. Burt,
1 Term Rep.
701.

The lessor of the plaintiff offered evidence to shew that at the time of the lease the cellar in question was
in

in the occupation of *B.* another tenant; and therefore that it could not have been the intention of the parties that it should pass by the lease to the defendant, and that the defendant had not claimed it till after the expiration of that lease. The defendant's counsel objected to this evidence, because the lessor of the plaintiff was estopped by his own deed, from saying it was not meant to pass. But *Buller, J.* was of opinion that the evidence was admissible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a nonsuit if the objection were well founded.

The court was of opinion that it was proper to receive the evidence offered at the trial; which, when received, proved that the cellar was not intended to be passed by the demise.

§ 42. The words all lands and meadows to the said messuage or mill belonging, or used, occupied, or enjoyed, or deemed, taken, or accepted as part thereof, have been held to pass in a release, leasehold as well as freehold lands.

Doe v.
Williams,
1 H. Black.
R. 25.

§ 43. In an indenture of release the parcels were described to be all that messuage, mill, and lands, called *Clock Mills*, and all lands and meadows to the said messuage or mill belonging, or used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof. There were some lands held for the remainder of a term of a thousand years, which had
been

been occupied with, and reputed part of, the *Clock Mills* estate, for upwards of thirty years.

It was objected that these lands being leasehold did not pass by the release, but it was determined that they did pass.

§ 44. Modern conveyancers have introduced a set of general words after the particular description of the things intended to be conveyed, which are now usually adopted, and are frequently useful. And after those general words is usually inserted the words—“ And
“ all the estate, right, title, interest, use, trust, pro-
“ perty, claim, and demand, both at law and in
“ equity of the said *A. B.*, in, to, and out of the
“ same premises, and every or any part or parcel
“ thereof.”—But this clause only applies to cases where the grantor departs with his whole estate and interest in the thing granted.

§ 45. The next clause usually inserted in the premises is—“ Together with all deeds, evidences, and
“ writings, &c.” for although in general deeds follow the land, and a purchaser in fee is entitled to them, without any particular grant for that purpose, yet it is not amiss to insert this clause, and in conveyances to uses it ought never to be omitted; because in that case, there is a doubt, whether the deeds go to the releasees to uses, or to the *cestui que use*.

Clause
respecting
Deeds.

1 Inst. 6 a.
n. 4.
1 Rep. 1.

§ 46. In cases where the grantor warrants the title against all mankind, he is entitled to retain the deeds
in

Idem.

in his possession, because he is bound to defend the title at his peril.

§ 47. Where only a part of an estate held under one title is sold, this clause is not inserted, because the grantor is allowed in that case to keep the title deeds, and the grantee is only entitled to a covenant from the grantor to produce the deeds whenever there shall be occasion for them.

Exception.

§ 48. The next clause in the premises of a deed is that, whereby the grantor excepts something out of that which he has before granted, by which means it does not pass by the grant, and is severed from the thing granted.

Shep. T. 77.

§ 49. The following circumstances are necessary to make a good exception. 1st, It must be made by apt words. 2d, The thing excepted must be part of the thing previously granted, and not of any other thing. 3d, It must only be a part of the thing granted, for if the exception extends to the whole, it will be void. 4th, It must be of such a thing as is severable from the thing granted, and not an inseparable interest or incident. 5th, It must be such a thing as that he who excepts may retain it. 6th, It must be of a particular thing out of a general one; not a particular thing out of a particular one. 7th, It must be certainly described and set down.

Dorrell v.
Collins,
Cro. Eliz. 6.

Habendum.

§ 50. The second part of a deed is the *habendum*, the proper office of which is to determine what estate
or

or interest is granted by the deed ; though that may be also done in the premises. It is called the *habendum* because in all the old *Latin* deeds it began with that word.

§ 51. The description of the things granted need not be repeated in the *habendum*, as it is sufficient that they are described in the premises. For it is in the premises that the grant is really made, and the very word *habendum*, or to hold, as it is translated, indicates a reference to what is described in the premises. With respect to the words required by the law to create an estate in fee, &c. in a deed they will be stated in a subsequent chapter.

§ 52. The third part of a deed is called the *Tenendum* ~~tenendum~~, which was formerly used to express the tenure by which the estate granted was to be held. But since all freehold tenures have been changed into free and common socage, the *tenendum* is of no farther use, and is therefore joined to the *habendum*.

53. The fourth part of a deed is the *reddendum*, *Reddendum*, whereby the feoffor or lessor reserves some new thing to himself out of that which he granted before. The following circumstances are required to make a good reservation. 1st, It must be by apt words. 2d, It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3d, It must

Shep. T. 80.

must be of such a thing whereunto the grantor may
Vide Tit. 28. have resort to distrain. 4th, It must be made to
c. 1. f. 17.
&c. one of the grantors, and not to a stranger to the
deed.

Condition.

Tit. 13.

§ 54. The fifth part of a deed is the Condition,
which has been described in a former title.

TITLE XXXII.

D E E D.

CHAP. IV.

Same Subject continued.—Warranty.

- | | |
|--|---|
| <p>§ 1. <i>Warranty.</i>
 2. <i>Express Warranty.</i>
 5. <i>Implied Warranty.</i>
 9. <i>Lineal Warranty.</i>
 11. <i>Assets.</i>
 14. <i>Collateral Warranty.</i>
 18. <i>Statute of Gloucester.</i>
 19. <i>Statute de Donis.</i></p> | <p>§ 23. <i>A Collateral Warranty bars Estates Tail.</i>
 24. <i>And all Remainders Expectant thereon.</i>
 27. <i>Statute 11 Hen. 7. c. 20.</i>
 28. <i>Statute 4 Ann, c. 16.</i>
 29. <i>How a Warranty may be destroyed.</i></p> |
|--|---|

Section 1.

THE sixth part of a deed is the warranty, which is Warranty.
described by Lord *Coke* to be, “ a covenant real 1 Inst. 365 a.
“ annexed to lands or tenements, whereby a man and
“ his heirs are bound to warrant the same, and, either
“ upon voucher or by judgment in a writ of *warrantia carta*, to yield other lands and tenements to the
“ value of those that shall be evicted by a former title,
“ or else may be used by way of rebutter.”

§ 2. A warranty may either be expressed or implied, either in deed or in law. An express warranty, Express Warranty.
or a warranty in deed, is when the person who conveys an estate enters into an express warranty to the purchaser: and, in this case, the word *warrantizo*, or warrant, is the only apt and effectual 1 Inst. 384 a.
word.

Lit. f. 773.

1 Inst. 383 b.

1 Inst. 47 a.

84 b. 385 b.

§ 3. The usual form of a warranty was *ego et hæredes mei warrantizabimus*, and the word heirs is absolutely necessary, for, if not inserted, the heirs are not bound. So, with respect to the person to whom a warranty is made, it is held, that, unless it be to another and his heirs, or in words which relate to heirs, it extends only for life.

§ 4. To make a good express warranty, the fol-

Inst. 367 b. lowing circumstances are necessary: 1st, That the person who makes a warranty be capable of so doing: for, if an infant makes a feoffment in fee of land, and binds himself and his heirs to warrant it, the warranty is void, though the feoffment be only voidable.

1 Inst. 386 a. 2d, A warranty must be made by deed in writing; for a warranty inserted in a will would be void. 3d, There must be some estate to which the warranty is annexed, that is capable of supporting it; for, if a person covenants to warrant land to another, and makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing, in these cases the

1 Inst. 378 a. warranty is void. 4th, The estate to which the warranty is annexed, must be capable of supporting it; that is, it must be an estate of freehold: for, if a person makes a lease for years, and binds himself and his heirs to warrant the land to the lessee, this is no warranty, though it may amount to a covenant. 5th,

1 Inst. 386 a. The warranty must descend upon the person, who is heir, of the whole blood by the common law, to him who made the warranty. 6th, The heir must continue heir, and neither the descent of the title, nor of the warranty, be interrupted: for, if a person binds him-

Lit. f. 745.

self

self and his heirs to warranty, and afterwards is attainted of treason or felony and dies, this warranty will not bind his heirs. So if a tenant in tail be disseised, and, after, release to the disseisor with warranty, and the tenant in tail is attainted of felony, and hath issue and dies, this warranty will not bind the issue.

7th, The estate that is to be barred by a warranty must be divested and turned to a right, before or at the time when the warranty is made; and the person on whom the warranty descends, must then have but a right to the land. 8th, The warranty must take effect in the life-time of the ancestor, who must be bound by it; for the heir shall never be bound by an express warranty, unless the ancestor was bound by it. 9th, The heir must claim in the same right that the ancestor does: so, the heir must be of full age, when the warranty falls upon him, otherwise he will not be barred by it.

10 Rep. 95.
Vide Tit. 35.

1 Inst. 386 a.

1 Inst. 370 a.

1 Inst. 380.

1 Lord Ray.
35.

§ 5. Implied warranties, or warranties in law, are those which arise from the nature of the deed itself, or from some other word than the word warranty. Thus the words *dedi et concessi*, or the word *dedi* alone, in a feoffment, amount to an implied warranty, during the life of the feoffor. But the word *concessi* alone does not create an implied warranty.

Implied
Warranty.

1 Inst. 384 a.

§ 6. In an exchange, the word *excambium* imports a mutual warranty: and, in partition, it is implied that the one warrants to the other. So, where there is a gift in tail, or a lease for life of land, reserving rent, the donor or lessor is bound to warranty.

1 Inst. 384 d.
& b.

1 Inst. 384.
n. 1.

§ 7. It has been generally supposed, that the word grant, in any conveyance, will create a warranty, and therefore trustees are advised not to convey by the word grant. But it is now agreed, that the word grant, when used in the conveyance of an estate of inheritance, does not imply a warranty, and that, if it did, the insertion of any express covenant, on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant; as the law will not, when it appears by express words, how far the parties designed the warranty should extend, carry it farther by construction.

1 Inst. 384 a.

§ 8. Lord *Coke* says, if a man makes a lease for life, reserving a rent, and adds an express warranty, it will not take away the warranty in law, for the lessee will have his election to vouch by force of either of them.

Lineal Warranty.

Lit. f. 707.

§ 9. Warranty is again divided into lineal and collateral. Lineal warranty is, where the heir derives, or might by possibility derive his title to the land warranted, either from or through the ancestor who made the warranty. Thus, where a man, seised in fee of lands, made a feoffment of them to another, and bound himself and his heirs to warranty, and died, leaving a son, upon whom the warranty descended, it was a lineal warranty: so, where a father or an eldest son, in the lifetime of his father, released to a disseisor with warranty, this was lineal to the youngest son.

§ 10. The

§ 10. The effects of a lineal warranty are, 1st, To bar the warrantor and his heirs from ever claiming the lands warranted; so that, if a purchaser with warranty is impleaded by the warrantor or his heirs, he may show his warranty, which, in pleading, is called a *rebutter*, and is an effectual bar to the claim of the warrantor or his heirs.

2d, To compel the warrantor, and his heirs, to give the warrantee, in case of eviction, lands of equal value to those he has lost; and, therefore, if a purchaser with warranty is impleaded or sued by a stranger for the land, he may vouch, that is, call in the warrantor, or his heirs, to defend the land; and if the vouchee cannot defend them, he must then give the warrantee lands of equal value to those he has lost. Vide Tit. 36.

§ 11. The obligation which the heir of the warrantor is under, of giving the warrantee, in case of eviction, lands of equal value to those he has lost, was, however, only on condition, that he had other lands of equal value by descent from the warranting ancestor, which are called *Assets*. Assets.

§ 12. Lands in the possession of an heir must have the following qualities, in order to be considered as assets. 1st, They must be of equal or greater value than the lands warranted at the time of their descent, from whence they derive the name of assets. 1 Inst. 374.

2d, They must be held in fee-simple, have descended from the common ancestor, and be vested in possession, and not in right.

Fitz. N. B.
134.
1 Rep. 1.

§ 13. A purchaser with warranty may, at any time, bring a writ of *warrantia chartæ* upon the warranty, either against the warrantor or his heirs; and, by that means, all the lands whereof the warrantor or his heirs was seised at the time of suing out the writ, will be bound and charged with the warranty.

Collateral
Warranty.
2 Com. 301.

§ 14. A collateral warranty has been defined to be, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; and yet it barred the heir from ever claiming the land, and also imposed on him the same obligation of giving the warrantee other lands in case of eviction, as if the warranty were lineal, provided the heir had assets.

Lit. f. 704.

§ 15. Thus, *Littleton* says, if there be father and son, and the son purchases lands in fee, the father disfeises him, and aliens to a stranger with warranty; this is a collateral warranty, which will effectually bar the son from ever claiming those lands; and, although the son be lineal heir to his father, yet, as he does not derive his title to this estate from his father, the warranty is collateral.

Lit. f. 707.

So, if a younger brother released to his father's disfeisor, with warranty, it was collateral to the elder brother.

§ 16. The effect of a collateral warranty is so singular, and so apparently unjust, that many enquiries have been made respecting its origin. Sir *Martin Wright* endeavours to account for it in the following manner :

It

It was a maxim of our ancient law, that no person could alien his feud without the consent of his next collateral heir, *qui proximus erat in successione collateralis*; for, although the law trusted the ancestor with the interest of his own immediate descendants, yet he could not disinherit the next collateral heir, who, having a distinct, though remote interest in the feudal donation, could not be deprived of it but by an act of his own; this manifestly points out the foundation, and, partly, suggests the reason of collateral warranty; though it is not easy to conceive how it came to pass, that the concurrence or simple consent of the next collateral, which, by the old law, was requisite to defeat his own hopes of succession, should swell up to our notions of collateral warranty, and be advanced into a means to defeat, even estates to which such collaterals could have no possible hopes of succeeding.

Wright's Tca.
168.

§ 17. Lord Chief Baron *Gilbert*, whose authority is of the greatest weight, has endeavoured to account for collateral warranty in another manner. He thinks it arose from the construction of the statute *de Donis*. It was usual to quiet disseisins, which were very frequent in those unsettled times, by the disseisor's purchasing warranties from some ancestor of the family, and this gave a right to such disseisor; for it was easier to compound with the ancestor, than with the party to whom the wrong was actually done: and it was determined, for the quieting men's possessions, that such warranties should bind, if the owner acquiesced under his expectations from the warranting ancestor, and did not, during his life, attempt to recover the lands;

Ten 143.

for no warranty was ever a bar, until it descended on a person, that is, until after the death of the warrantor.

Rot. Parl.
v. 2. p. 332.
n. 27.

§ 18. Collateral warranty was so great a grievance, that in 50 *Edw. 3.*, the commons petitioned the king to declare that no collateral warranty should thenceforth be a bar, unless where assents descended from the warranting ancestor; to which, his Majesty answered, that he would consider of it until the next parliament.

Statute of
Gloucester.

2 Inst. 291.
1 Inst. 365 a.

§ 19. There have been several statutes made to restrain the operation of warranties. The first of these is the statute of *Gloucester*, 6 *Edw. 1. c. 1.*, by which it was enacted, that if a tenant by the curtesy aliened the estate which he held by the curtesy, with warranty, his son should not be barred by such warranty, unless he inherited lands of equal value from his father.

Statute de
Donis.

Lit. f. 708.
Gilb. Ten.
142.

§ 20. The next statute by which the operation of warranties was qualified, was the statute *de Donis Conditionalibus*, the object of which being to secure the continuance of the estate tail to the issue of the donee, and the reversion to the donor, upon the determination of the estate tail; it was held by the judges, that a tenant in tail could not bar his issue by a lineal warranty. But by a kind of analogy to what the legislature had done, by the statute of *Gloucester*, they held, that such a warranty would bar the issue, if they inherited from the warranting ancestor an estate of equal value to that which he had warranted; that is, that

1 Inst. 384 a.

that a lineal warranty by a tenant in tail, was no bar to the issue without assets.

§ 21. This reasoning may be extended to the reversion of the person creating the intail, for the statute *de Donis* is as precise in its protection of the donor's reversion, as of the estate tail itself; and, therefore, it may be concluded, that no warranty of the tenant in tail will rebut the donor from claiming the reversion, upon the determination of the estate tail.

§ 22. *William Vesey* devised the lands in question to *John Vesey* his eldest son for life, and, after, to the heirs male of his body, remainder to *Robert Vesey* and the heirs male of his body, remainder to *William Vesey* and the heirs male of his body, remainder to *Mathew Vesey* and the heirs male of his body, and died. *John* entered and died without any male issue, leaving two daughters, *Elizabeth* and *Sarah*. After the death of *John*, *Robert* entered, and died seised without male issue; upon which, *William* entered, and *Mathew* died without issue male in the lifetime of *William*.

Bole v.
Horton,
Vaugh. 360.

William made a feoffment of the lands, with warranty to the use of himself for life, remainder to the use of *Ann* his wife for life, remainder over. *William* died without leaving any male issue, and *Ann* his wife entered.

Elizabeth and *Sarah*, the daughters and coheirs of *John*, brought a formedon in the reverter against *Ann* the widow of *William*, who pleaded the warranty of *William*.

William, whose cousins and coheirs they were; and the question was, whether *Ann* could rebut them by the warranty.

Lord Chief Justice *Vaughan* argued, that the statute *de Donis* restrained the warranty of tenant in tail from barring the donor's reversion, by expressly providing, that the donee in tail should not have it in his power to bar the donor of his reversion. *Ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post eorum obitum, vel ad donatorem vel ad ejus heredem (si exitus deficiat) revertatur.* By these words, the donee or tenant in tail is restrained from all power of alienation, whereby the lands entailed may not descend to the heir in tail after his death; therefore, by these words, he is restrained from alienation with warranty, which doubtless would hinder the lands so to descend, if it were not restrained by the words of the statute. By the same words, the donee in tail is restrained from the power of alienation, whereby the land intailed may not revert to the donor for want of issue in tail. Therefore, by these words, he is restrained from such alienation with warranty, whereby the lands may not revert to the donor or his heirs, for want of issue in tail; for the same words of the statute must be of equal power and extent to restrain the donee's alienation from damaging the donor, as from damaging the issue in tail. Admit the words of restraint in the statute *de Donis* had been *rex statuit, &c. Ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione,*

done, potestatem alienandi tenementum sic datum, per warrantiam, vel aliter quo minus ad exitum eorum remaneat, vel ad donatorem revertatur; it had then been clear to every understanding, that the warranty of the donee or tenant in tail, by the express words of the statute, did neither bar the donor nor the issue in tail, and then observe what consequences had been rightly deduced from such restraint made by the statute. The statute expressly restrains the warranty of tenant in tail from barring his issue; whence it follows, that, by the statute, the issue in tail is not barred by the lineal warranty of the tenant in tail, because his warranty upon the issue in tail cannot possibly be any other than a lineal warranty. It may be said, in like manner, that the statute *de Donis* restrains the warranty of tenant in tail from barring the donor, or his heir, of the reversion: the consequence, thence deducible, is, that the statute restrains the collateral warranty of tenant in tail from barring the donor or his heirs, because his warranty falling upon the donor, or his heir, can be no other than a collateral warranty. Now, it is true, the word warranty is not, in syllables, within the restraint of the statute; but it is necessarily implied in it, else the issue in tail would be barred by the warranty of tenant in tail, without assets, contrary to all the books since the making of the statute. But those general words of the statute restraining the donees power of alienation in express terms equally and *pari passu* for the benefit of the donor, as for the benefit of the issue in tail, can never be understood to restrain the warranty of tenant in tail only, for the benefit of the issue in tail, but not for the benefit of the donor. But the statute must necessarily

family restrain his warranty indefinitely from hurting either; and, by consequence, his lineal warranty is restrained from hurting his issue, and his collateral warranty from hurting the donor, to whom his warranty can never be but collateral, as it can never be but lineal, to the issue in tail. And if the warranty be necessarily understood and implied in the statute, its operation must be the same as if it had been expressly inserted in the statute. Then, to say, that by the restraint of the statute, the donees have *not* power to alien the land intailed *quo minus ad exitum illorum remaneat post illorum mortem*, but they *have* power to alien *quo minus ad donatorem revertatur deficiente exitu*, would be to make the statute contradictory to itself.

No judgment was given in this case, the court being divided; *Vaughan* and *Archer* for the demandant; and *Wylde* and *Atkyns* for the tenant: but *Vaughan's* opinion is generally held to be law.

A collateral
Warranty
bars Estates
Tail.
Gilb. Ten.
142. 145.

§ 23. A collateral warranty is not prohibited by the statute *de Donis*; for, as that statute only declared that the will of the donor should be observed, the judges would not extend it to collaterals, who did not take by the gift, and who, therefore, could not be forbidden from barring by their warranty.

Sect. 708. to
716.

Thus, *Littleton* says, that if a tenant in tail hath issue three sons, and discontinues the estate tail in fee, and the second son releases by deed to the discontinuee with warranty, and dies without issue, this warranty will
rebut

rebut the eldest son, and prevent him from recovering the estate tail, because it is a collateral warranty; for the eldest son cannot make a title to the second son under the intail.

§ 24. With respect to remainders expectant on estates tail, there is nothing in the statute *de Donis*, which either, directly or indirectly, restrains the tenant in tail from barring them by his warranty; and, therefore, the operation of a warranty in rebutting remainder men, expectant upon estates tail, remains as it was before the statute; so that such warranty will now bar them without assents.

And all Remainders expectant thereon.
Sym's Case,
8 Rep. 51 b.

§ 25. In the case of *Bole v. Horton*, which has been already stated, Lord Chief Justice *Vaughan* lays it down as clear law, that the statute *de Donis* does not restrain the warranty of tenant in tail from barring remaindermen, by the descent of the warranty on them. 1st, Because the mischief complained of in this statute was, that the issue in tail was disinherited. But the warranty of the donee in tail descending upon the remainderman, who claims by purchase from the donor, and not by descent from the donee in tail, could be no disinheriting of the issue of the donee. 2d, The statute did not provide against inconveniencies, or mischiefs which did not exist at the time of making the statute. Now, when the statute was made, there could be no remainder in tail, because all estates which are estates tail since the statute, were fee-simple conditional before the statute, upon which a remainder could not be limited.

Ante f. 21.

§ 27. This

Rob. Gav.
125 note.
1 Inst. 373 b.
n. 2.

§ 26. This opinion was extrajudicial, as that point was not before the court; but I cannot find that it was ever contradicted. And it is now held, that if *A.* be tenant in tail, remainder to *B.* his next brother in tail, (which is a very common case arising upon almost every marriage settlement), and *A.* being in possession, makes a feoffment with warranty, or levies a fine, (in which there is always a warranty), of the estate tail, and dies without issue, this warranty being collateral to *B.*, who claims by way of remainder, will therefore bar him without assents.

Statute
11 Hen. 7.
c. 20.

Lincoln Col-
lege Case,
3 Rep. 58.

§ 27. By the statute 11 *Hen.* 7. c. 20., it is enacted, that in case a wife, after the death of her husband, shall alone, or with any after taken husband, alien with warranty, any lands which she holds in dower, or of which she is seised in tail, of the gift of her former husband, or of any of his ancestors, such warranty shall be void.

For the construction of this statute, vide Title 36. Recoveries.

Statute 4 Ann,
c. 16.

§ 28. By the statute 4 *Ann.* c. 16. s. 21., it is enacted, that all warranties made after the first day of *Trinity* Term 1706, by any tenant for life of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect: and, likewise, all collateral warranties which shall be made after the same day of any lands, tenements, or hereditaments, by any ancestor-

ancestor who has no estate of inheritance in possession in the same, shall be void against his heir.

It is observable, that this statute does not extend to the alienation of a tenant in tail in possession, and therefore his warranty is not restrained by this act. Ante f. 22.
25.

§ 29. A warranty may be destroyed by the attainder of the warrantor, for, in that case, he becomes incapable of transmitting any thing by descent. How a Warranty may be destroyed.
Lit. f. 745.
747.

TITLE XXXII.

D E E D.

CHAP. V.

The same Subject continued.—Covenants and Conclusion.

- | | |
|--|---|
| <p>§ 1. <i>Of Covenants</i>
 5. <i>No technical Words necessary.</i>
 8. <i>Implied Covenants.</i>
 12. <i>Joint and several Covenants.</i>
 16. <i>Covenants real.</i>
 17. <i>Bind all claiming under the Grantee.</i>
 30. <i>And all claiming under the Grantor.</i>
 37. <i>Covenants for the Title to Lands.</i>
 46. <i>Usually restrained to the Acts of the Vendor.</i></p> | <p>§ 50. <i>Who are held to claim through the Vendor.</i>
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 53. <i>Covenants for Production of Title Deeds.</i>
 54. <i>What Covenants where the Title is defective.</i>
 55. <i>Remedies under these Covenants.</i>
 65. <i>Who are bound to enter into these Covenants.</i>
 70. <i>Conclusion.</i></p> |
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Section 1.

Of Covenants.

THE seventh part of a deed is the covenant, which is an engagement or agreement by which one person obliges himself to do something beneficial to, or to abstain from something, which, if done, might be prejudicial to another. And a great variety of agreements of this kind have been introduced into modern deeds.

Plowd. 138.
1 Vent. 26.

§ 2. A covenant is generally an agreement to do something *in futuro*, and differs from the case where an agreement refers to a thing which is not to be done by the person of any; but to a thing to be executed

in itself. And where an agreement terminates in itself, it is not properly a covenant, but a defeazance. A covenant may however be executed, namely, that a thing is done already. *Shep. T. 162.*

§ 3. A covenant can only be created by deed, but it may as well be by deed poll, as by indenture; for the covenantee's acceptance of the deed delivered to him is such an assent to the agreement, as will render it binding on him. But in the case of a deed poll the party must be named in the deed. *1 Roll. Ab. 517. Fitz. N. B. 145. Green v. Horne, 1 Salk. 197.*

§ 4. Where lands are conveyed by indenture to two persons and one of them does not seal the deed, yet if he enters upon the land, and accepts of the deed in other matters, he will be bound by the covenants contained in it. *1 Inst. 231 a.*

§ 5. The law has not appropriated any particular form of words to the creation of a covenant; and therefore any words will be sufficient for that purpose, which shew the intention of the parties to enter into a covenant. *No technical Words necessary. 1 Vef. R. 516.*

§ 6. In articles of agreement reciting an intended marriage, it was covenanted that in consideration of the lady's portion, a jointure should be settled on her: and the conclusion was in these words—"And it is hereby agreed that a fine shall be levied to secure the payment of the said portion." It was resolved, that these words created a covenant to levy a fine: for, *Hollis v. Carr, 2 Mod. 86. Harwood v. Hilliard, 2 Mod. 268.*

wherever there is an agreement under hand and seal, covenant lies.

Williamson v.
Codrington,
1 Ves. R. 511.

§ 7. Where a person obliged himself to warrant and for ever defend the lands conveyed: It was held by Lord *Hardwicke* not to be a warranty, but a covenant.

Implied
Covenants.

4 Rep. 80 b.
5 Rep. 17 a.

§ 8. There are some words, which, when used in particular contracts, will create a covenant. Thus, if a person makes a lease for years by the words *concessi* or *demisi*, grant or demise, they will create a covenant for quiet enjoyment of the lands demised: and, if the lessee be evicted by the lessor, or by any person claiming a lawful title to the land, he may bring an action thereupon.

Giles v.
Hooper,
Carth. 135.

§ 9. So, if a lease for years be made, *reserving* or *yielding and paying* a certain rent; these words will create a covenant for payment of the rent.

3 Burr. R.
1639.
Amb. R. 250.

§ 10. Lord *Mansfield* has said, that the distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly: for a man may, without consideration, enter into an express covenant, under hand and seal.

Noke's Case,
4 Rep. 80 b.
1 Mod. 113.
1 Vesey 101.

§ 11. An express covenant will qualify the generality of an implied covenant, and restrain it; so that it shall not extend farther than the express covenant.

Joint and
several Cove-
nants.

§ 12. Where several persons enter into a covenant, they may either bind themselves altogether, or else they

they may bind each of themselves severally : from whence arises a distinction between joint and several covenants. A covenant of this kind may also be both joint and several.

§ 13. If two lessees covenant jointly and severally at the beginning of a lease, these words extend to all their subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor.

§ 14. In a lease of coal-mines made by the Duke of Northumberland to *G. Errington* and *John Ward*, there was a string of covenants introduced by these words, “ And the said *G. Errington* and *J. Ward* “ for themselves jointly and severally, and for their “ several and respective heirs, &c.” Then came a proviso in these words, “ And it was thereby declared “ by and between the said parties, and the said Duke “ did thereby covenant that it should be lawful for “ the lessees to sell a certain quantity of a particular “ sort of coals, *they the said G. Errington and J. Ward* paying and accounting to the Duke for the “ same.” An action was brought by the Duke against the executors of *G. Errington*, upon these words : and the question was, whether they amounted to a several covenant.

Duke of N.
v. Errington,
5 Term R.
522

It was determined, that the general words at the beginning of the covenants by the lessees—“ jointly “ and severally in manner following,”—extended to all their subsequent covenants ; which were, therefore, all joint and several.

Slingsby's
Case,
5 Rep. 18.
Jenk. 262.

§ 15. Where a person covenants with two or more persons, and with each of them, if each of the covenantees takes a several interest or estate, the covenant is several. But, if the covenantees take a joint interest in the subject matter of the covenant, it is a joint covenant: as, if a man by indenture demises, to *A. Black-acre*, to *B. White-acre*, to *C. Green-acre*, and covenants with them and every of them, that he is lawful owner of all the said acres; in that case, as the interests are several and distinct, the words "*every of them*," will make the covenant several. But, if the three acres had been demised to them jointly, then the words "*every of them*" would have been void: for a man, by his covenant (unless in respect of several interests) cannot make it first joint and then several, by means of the words "*every of them*." For, although several persons may bind themselves and every of them, and so the obligation shall be joint or several at the election of the obligee; yet a man cannot bind himself to three and to each of them, to make it joint or several, at the election of several persons, for one and the same cause: for the court would be in doubt, for which of them to give judgment; also, the covenantor would be several times charged with one and the same thing: and therefore the words, "*and every of them*," are in such case of no effect, and do not sever the joint cause of action.

Johnson v.
Wilson,
Willes R. 248.

Covenants
real.
1 Inst. 384 b.
Law of Cov.
c 11.
Shep. T. 161.

§ 16. Covenants are divided into real and personal. Covenants real are those which have for their object something annexed to, or inherent in, or connected with, land, or other real property; and, as such covenants

nants descend to the heir, and are transferred to the purchaser of the land by the conveyance, they are said to run with the land.

Congham v. King,
C10. Car. 221.

§ 17. In consequence of this doctrine, where a covenant is entered into by the grantee or lessee, which relates to the land, it will bind not only such grantee or lessee, but also the assignee of such grantee or lessee; and the grantor or lessor, or their heirs, may at any time bring an action on such covenant.

Bind all
claiming
under the
Grantee.

§ 18. It was resolved in 25 *Eliz.* that, where a covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land and bind the assignee; though he be not bound by express words. But, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to a thing which does not exist.

Spencer's
Case,
5 Rep. 16 a.

§ 19. Where, in a lease for years, the lessee covenanted with the lessor, his executors and administrators, to repair; and the lessor died: It was held that his heir might bring an action on the covenant; for it was annexed to the land, and went to the heir, though he was not named. And it appeared that it was intended to continue after the death of the lessor, his executor being named.

Lougher v.
Williams,
2 Lev. 93.

§ 20. But, where the lessor was only tenant for life, it was held, that his heir was not entitled to the benefit

Bradnell v.
Roberts,
2 Will. R.
143.

benefit of covenants made with him ; because the lease determined by his death.

§ 21. Although the assignee be liable to the covenants which run with the land, yet that circumstance will not discharge the assignor, who will still continue liable to them.

*Barnard v.
Godscall,
Cro. Jac. 309.*

§ 22. An action of covenant was brought by the lessor of a house against the lessee, for not repairing it after warning given. The defendant pleaded that, long before that warning, he had assigned over his term to J. S., from whom the plaintiff afterwards received the rent.

It was determined, that the action against the lessee was maintainable, notwithstanding the assignment, and acceptance of rent,

§ 23. If the tenant be not assignee of the whole term, he is then in fact only an undertenant, and is not liable to an action on the covenant,

*Holford v.
Hatch,
Doug. 182.*

§ 24. An action of covenant was brought for rent in arrear against the defendant, as assignee of one *Saunders*. On the trial it appeared, that the defendant was in possession of the premises during the time when the rent in arrear became due; but that, by the deed under which he held, they were conveyed to him by *Saunders* for a day or two less than the original term. For the plaintiff it was contended, that, the covenant for rent being one of those which runs

runs with the land, every person, who takes under the original lease, is liable to it. To this purpose the defendant, although he had not strictly taken the whole of the lessee's interest, in point of duration, was to be considered as his assignee. A devisee, an executor, an assignee under the bankrupt laws, or one who purchases a term from the sheriff under an execution, are assignees in law to the effect of being liable to covenants for rent, &c.; although the transfer to them does not amount to a forfeiture under a covenant not to assign. The landlord is entitled to look for the rent to the person in possession, and ought not to be driven to the necessity of finding out the original lessee, and bringing his action against him.

On the other side it was insisted, that there was not a better known distinction in the law, than that between an assignee and an undertenant. Only assignees of the whole term, whether by actual assignment, or by devise, sale under an execution, &c. are liable to the covenants for rent, &c.: for, if there is a reversion of a day by the immediate lessee, there is no privity between the undertenant and the first lessor.

Lord *Mansfield*.—This is an action of covenant by a lessor against an under-lessee; and the single question is, whether the action can be maintained against him, as being substantially an assignee. For some time we have had great doubts; we have bestowed a great deal of consideration on the subject, and looked carefully into the books: and it is clearly settled, (and is agreeable to the text of *Littleton*,) that the action

cannot be maintained, unless against an assignee of the whole term.

Tit. 13. c. 2.
f. 55.

§ 25. It has been stated in a former title, that, upon the dissolution of the monasteries by *Hen. 8.*, most of their estates were granted to private persons; who could not take advantage of the conditions contained in the leases that had been formerly made of those estates, which produced the statute 32 *Hen. 8.* c. 34. This act extends to covenants as well as to conditions; it being thereby enacted that the assignees of reversions shall have such like and the same advantage, &c. by action only, for not performing the covenants contained in the said leases, as the lessors or grantors themselves, or their heirs or successors, might have had.

Spencer's
Case,
5 Rep. 18 a.
1 Inst. 215 b.

§ 26. It was resolved in 25 *Ediz.*, that this act extends only to covenants, which touch or concern the thing demised, and not to collateral covenants; and, therefore, the intent of the statute was not to transfer any privity of contract, but to annex the covenants, touching or concerning the land demised, to the reversion; so that they might pass as annexed and incident to the reversion.

Thursby v.
Plant,
1 Saund. 237.
s. 3, 4, 5.

Webb v.
Russell,
3 Term R.
393.

§ 27. In a modern case it was resolved by the Court of King's Bench, that, if a mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagor cannot maintain an action for the breach of these covenants; because they
are

are collateral to his grantor's interest in the land, and therefore do not run with it. And Mr. Serjeant *Shepherd*, in arguing this case, stated that there were three relations at common law, which might exist between the lessor and lessee, and their respective assignees. First, privity of contract; which is created by the contract itself, and subsists for ever between the lessor and lessee. Secondly, privity of estate; which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner. And, thirdly, privity of contract and estate; which exists, where both the term and reversion remain in the original covenantors. The statute 32 *Hen. 8.* seems to have created a fourth relation; a privity of contract in respect of the estate, as between the assignees of the reversion, and the lessees or their assignees. The statute annexes, or rather creates, a privity of contract between those, who have privity of estate; and, when the one fails, the other fails with it.

It was also resolved in this case, that, if a tenant for a term of years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged; the covenants incident to that reversionary interest are thereby extinguished,

§ 28. Lord *Coke* observes, that an assignee of part of the estate of the reversion may take advantage of a condition, and consequently of a covenant: as, where a reversion in fee is granted for life, the grantee shall

1 Inst. 215 a.

shall have the benefit of the covenants. But a grantee of part of the reversion shall not take advantage of a covenant; and therefore, if a reversion consists of three acres, and two of the acres are granted, the covenants are destroyed.

1 Inst. 215 b.

§ 29. His lordship also observes, that, if the reversion is conveyed by means of the statute of uses, the person to whom it is thus conveyed is a sufficient assignee within the statute; because he comes in by the act and limitation of the party, although he is in in the *post*. But such, as come in by act in law, as the lord by escheat, shall not derive any benefit from the statute.

And all claiming under the Grantor.

1 Inst. 384 a.

§ 30. As assignees of grantees or lessees are bound by all covenants real, annexed to the estate granted or leased, and which run with the land; so are they entitled to the benefit of all such covenants as are entered into by the grantors or lessors, and may maintain an action on them.

5 Rep. 17 a.

§ 31. Thus, in Spencer's case it was resolved, that, if a person made a lease for years by the words, "grant" or "demise," which imply a covenant for quiet enjoyment, and the assignee of the lessee was evicted, he should have a writ of covenant. For it was but reasonable he should have such benefit of the demise, as the original lessee might have had: and the lessor had no other prejudice than that to which his special contract with the original lessee bound him.

§ 32. A court

§ 32. A court of equity will give its assistance to an assignee against all persons claiming under the grantor of an estate, to procure him the benefit of the covenants contained in the grant, which run with the thing granted.

§ 33. *A.* and *K.* his wife, being seised in right of the said *K.* of two pieces of ground, by indenture 25 January 1622, granted a watercourse to one *J. H.* and his heirs, through the said two pieces of ground; and by the deed did covenant for them, their heirs and assigns, from time to time to cleanse the same; and that all fines and recoveries, levied and suffered, or to be levied and suffered, of the said grounds should be and enure to the strengthening and confirming the said watercourse according to the said grant: and, afterwards, a recovery was had, and a deed executed, declaring the uses to be as aforesaid. The watercourse, by mesne assignments, came to the plaintiff, and the said two pieces of ground to the defendant, who built on the same, and much heightened the ground that lay over the watercourse, and made it much more chargeable and inconvenient to repair; and, as it was alledged (and in part proved), the building had much obstructed the watercourse; so the bill was for establishing the enjoyment of the watercourse, and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant, being personal, was not at all strengthened by the recovery; and that the plaintiff and those under whom he claimed, being sensible of it,

Holmes v.
Buckley,
1 Ab. Eq. 27.

it, had for forty years cleansed the same at their own charges. But the court was of opinion, that this was a covenant which run with the land, and was made good by the recovery, and that, though the plaintiff had cleansed the same at his own charge, whilst it was easy to be done ; yet, since the right was plain upon the deed, and the cleansing made chargeable by the building, it was reasonable the defendant should do it ; and decreed accordingly.

§ 34. By the stat. 32 *Hen. 8. c. 34.* it is farther enacted, that all feoffees and grantees of any lordships or hereditaments for years, life or lives, their executors, administrators, and assigns, shall have the like action and remedy against all persons, having reversions of such lordships or hereditaments, for any covenants contained in their leases, as they might have had against the lessors or grantors, their heirs and successors.

§ 35. Where the whole of a term is assigned, and no reversion is left in the assignor, the assignee will be entitled to the benefit of the covenants contained in the original lease ; and may bring an action on them against the assignee of the lessor.

*Palmer v.
Edwards,
Doug. 186 n.*

§ 36. An action of covenant was brought by the plaintiff, as assignee of a term, against the defendant as assignee of the lessor, for not providing proper timber for repairs.

It

It was objected that, when the original lessee assigned over the term, the rent was reserved to such lessee and not to the lessor; and that the covenants, in the assignment by the original lessee, were not the same with those in the original lease.

On the other side, it was contended that, wherever the whole interest is conveyed, it is an assignment; and that, in such a case, the assignee stands exactly in the place of the lessee, and is entitled to the benefit of all the covenants on the part of the lessor.

The court was of this opinion, and gave judgment accordingly.

37. In all ancient feoffments, the feoffor entered into a general warranty with the feoffee, for the title to the lands conveyed. But warranties have been long since disused, and a set of covenants for securing the title have been substituted in their stead; which are now generally inserted in all conveyances, as being more beneficial in some respect to the grantees, and affording a more easy remedy, in case of a defect in the title, than could be obtained under the ancient warranty.

Covenants for
the Title to
Lands.

§ 38. By the first of these, the grantor covenants for himself, his heirs, executors, and administrators, with the grantee, his heirs and assigns, that he, the grantor, is lawfully seised in fee-simple of the premises conveyed.

By

By the second, he covenants that he has a good right and full power to convey the same.

By the third, he covenants that the grantee, his heirs and assigns, shall have, hold, and enjoy the premises granted, without the eviction or disturbance of any person whatever.

Where lands are conveyed to uses, the words are, that the estates conveyed shall be and remain to the uses thereby limited, without any eviction, &c.

By the fourth, the lands are declared to be free from all incumbrances whatever. And, by the fifth, the grantor binds himself and his heirs to make all such farther assurances of the lands, as shall be lawfully and reasonably required by the grantee or his heirs, or their counsel.

§ 39. Upon the construction of these covenants, the second of them has been held to be of the same import as the first: for, if the vendor be seised in fee, he has power to convey. But the converse of this proposition does not hold; for a person, not actually seised in fee, may have power to convey. Thus, where a tenant in tail conveys to a person, to make him tenant to the præcipe, in order that a common recovery may be suffered to the use of the purchaser in fee; or, where a person conveys under a power; the covenant is, that the grantor hath good right to convey.

3 Lev. 46.

§ 40. As to the covenant for quiet enjoyment it was formerly held, that it extended to all eviction whatever. Thus, it was resolved in 15 and 16 *Eliz.*, that where a person made a lease for a term of years, and covenanted, that the lessee should enjoy the premises during the term, without the eviction or interruption of any person, this extended to a tortious eviction.

Mountford v. Catelby,
Dyer 328 a.

§ 41. This doctrine has, however, been long exploded: and it has been settled, that the law will never adjudge a person to covenant against the wrongful acts of strangers, unless his covenant is express to that purpose: for the law itself defends every one against wrong. And, therefore, though a person should covenant in the most general terms for the title to lands, yet such covenant will not be held to extend to tortious entries: for, if a purchaser is tortiously evicted or disturbed, he has his remedy at law; and, if he is legally evicted he has his action on the covenant. Whereas, if general covenants for a title should be construed to extend to tortious evictions, a way might be opened for secret practices and combinations between a purchaser and strangers; that the purchaser might recover damages from the covenantors. This doctrine has been confirmed in the following modern case.

Vide 2 Saund. R. 178 a. n. 8.
181 a. n. 10.

§ 42. A person conveyed certain lands in the province of *New York*, in *North America*, to a purchaser in consideration of 1200*l.*; and covenanted that the purchaser should enjoy the premises without the let, trouble,

Dudley v. Folliott,
3 Term R. 584.

trouble, hindrance, &c. of the vendor or his heirs, and of and from all and every other person and persons whomsoever. The States of *America* seized the lands for an act done previous to the conveyance. An action was brought in the Court of King's Bench at *Westminster* upon this covenant: and, upon a demurrer, the court was of opinion, that the action did not lie; for even a general warranty, which is conceived in terms more general than this covenant, has been restrained to lawful interruptions.

Noble v.
Smith,
1 Hen. Black.
R. 34.

§ 43. But, where a person covenants to save the purchaser harmless from all acts of a particular person, there the vendor is bound to defend the purchaser against the entry of that person, whether by title or not.

Foster v.
Mapes,
Cro. Eliz.
212. Hob. 35.

§ 44. These covenants are real, and pass to all the assignees of the land, who may maintain actions upon them, against the vendor and his heirs. And *cestuis que use* are grantees within the statute 32 Hen. 8. c. 34, and are, therefore, entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands.

Middlemore
v. Goodall,
1 Roll Ab.
521.
Derisley v.
Custance,
4 Term R.
75.

§ 45. *Rachael Boyes* and her son conveyed a copyhold estate by lease and release to a mortgagee, and covenanted for farther assurance. The son died, and the mortgagee filed his bill against the customary heir of the son, who was an infant, praying that he might be decreed to surrender the estate to the plaintiff.

Spencer v.
Boyes, 4 Vef.
Jun. 370.

The Master of the Rolls said, he was clearly of opinion, that this covenant was a contract for a valuable consideration affecting the land, and would affect the heir. And, by the decree, it was declared, that the covenant in the mortgage deed bound the land descended to the defendant.

§ 46. Covenants for the title have been restrained for upwards of a century to the acts of the vendor and his ancestors, and of all persons claiming under them : and, although where covenants are several and of distinct natures, it has been held, that restrictive words annexed to one of the covenants, will not be applied to the other covenants ; yet, where all the covenants have the same object, and restrictive words are inserted in the first of them, they will be construed so as to extend to all the others.

Usually restrained to the Acts of the Vendor.

Gainsford v. Griffith,
1 Saund. 58.

§ 47. In a conveyance of an estate in fee, the vendor, after warranting the lands to the vendee and his heirs, against himself and his heirs, covenanted that, notwithstanding any act done by him to the contrary, he was seised in fee, &c. and that he had good right, full power, and lawful authority, to convey and assure the same to the vendee, and his heirs and assigns, in manner aforesaid. The vendee was evicted by a person, claiming under a title paramount to that of the vendor. An action of covenant was brought by the vendee against the representatives of the vendor. And it was contended on the part of the plaintiff, that the words “ good right, full power, &c.” extended to all persons whatever, and, consequently, that the vendee was en-

Browning v. Wright,
2 Bosanq. & Pull. 13.

titled to recover his purchase-money. But it was determined, that these words were either a part of the preceding special covenants, or, if not, that they were qualified by all the other special covenants, which restrained the covenants to the acts of the vendor and his heirs, and those claiming under him.

§ 48. Where the vendor has himself purchased the estate, the covenants are restrained to his own acts. The principle of this doctrine is thus ably stated by Mr. *Fearne*:

Posth. Works,
110.

“ Regularly, a vendor who purchases lands himself,
 “ with proper covenants from those who convey to
 “ him, cannot reasonably be required to covenant fur-
 “ ther than against himself, and those claiming under
 “ him. This is a practice founded in reason, where
 “ the vendee obtains the full benefit of all the cove-
 “ nants in the conveyance to the vendor, to the same
 “ extent as his vendor had them, by obtaining the
 “ possession of the deeds containing those covenants.
 “ When the vendor has parted with his means of
 “ claim or remedy against his grantor, for breach of
 “ his covenants, and transferred them to the pur-
 “ chafer, by delivery of the deeds, and such vendee
 “ comes into the vendor’s place in that respect, by the
 “ acquisition of such deeds, it would be unreasonable
 “ that the vendor should make *himself liable* for any
 “ such breach. He, by departing with the means of
 “ remedy or compensation, must be understood to
 “ have discharged himself from, and the vendee, by
 “ accepting those means, to have taken upon himself
 “ the

* the peril or risk of such breach, and the duty of
“ enforcing its remedy or compensation.”

§ 49. There are some exceptions to this rule: for, where the title-deeds are not delivered to the vendee, the covenants should extend to the acts of the person, from whom the vendor purchased the estate. Thus, Mr. *Fearne*, in the opinion of which, a part has been transcribed in the last section, proceeds in these words:

“ But this principle, I think, does not apply to those
“ cases where the vendor does not depart with, nor
“ the vendee acquire, the deed containing the cove-
“ nants for the title, against the acts of such grantors.
“ Whilst the vendor retains in his own hands the im-
“ mediate means of indemnity, which he thought
“ proper to require of his grantor, it seems but rea-
“ sonable that he should engage for the like indemnity
“ to his own vendee, and rely upon the indemnity he
“ has obtained for his own counter security. It is not,
“ I think, sufficient to say, that the covenant to pro-
“ duce his purchase-deeds will entitle the vendee to
“ the benefit thereof when produced. Such a covenant
“ cannot insure the production of them, which may be
“ prevented by accidents, for which the vendor, in
“ whose custody the deeds are, ought to be the sufferer,
“ rather than the vendee; who, by not having such
“ possession, could not in any degree be accessary to
“ the occasion of their loss, or by any means or care
“ have prevented it. There seems more reason, on
“ the other side, to say, it is sufficient for the vendor,
“ that, when called upon by the covenants entered
“ into by him to the vendee for enjoyment, &c. he

“ has his remedy over to the same extent upon his
 “ grantors, of which, as he retains the means in his
 “ custody, he is bound to look to the preservation of
 “ those means, and liable to the resort to, and due
 “ enforcement of them, and to bear the consequence
 “ of their loss.

“ Upon the whole, therefore, the present case does
 “ not appear to me to fall within the general rule,
 “ where the vendee acquires the custody or possession
 “ of the vendor's purchase-deeds; and that it is but
 “ reasonable that a vendor, retaining in his own cus-
 “ tody the only means of indemnity against the acts
 “ of his grantors, should engage to indemnify his
 “ vendee to the like extent. He cannot, I think,
 “ fairly object to his vendee's requiring an indemnity
 “ against the acts of the same persons, and to the
 “ same extent, as he himself required; nor, whilst
 “ he retains the means of enforcing such indemnity,
 “ deny his reliance upon, or refuse to subject himself
 “ to, a resort to those means. Withholding his own
 “ indemnity from the possession of the vendee, it is
 “ but fair he should give him the possession of an
 “ equivalent one.”

Who are held
 to claim
 through the
 Vendor.

§ 50. With respect to the persons who may be said
 to claim by or through the vendor, and to whose acts
 all modern covenants extend, it was determined by the
 Court of King's Bench, in a modern case, that a per-
 son, whose title was derived under a deed of revoca-
 tion and appointment of new uses, must be con-
 sidered

sidered as a person claiming by or through the appointor.

§ 51. Sir *John* and Lady *Astley* levied a fine of Lady *Astley's* estate, to the use of Sir *John* for life, remainder over, with power to Sir *John* to make leases, with a joint power of revocation. They afterwards revoked the uses, and appointed new ones, to Lady *Astley* for life, remainder over; remainder to Lady *Tankerville*. Sir *John Astley* afterwards made a lease not warranted by his power, and covenanted that the lessee should enjoy the premises without any interruption from him, or any person claiming under him. When Lord *Tankerville's* estate became vested in possession, he took advantage of the defect in the lease, and evicted the lessee, who brought his action of covenant against Sir *John Astley's* executors.

Hurd v.
Fletcher,
Doug. 43.

The question was, whether Lord *Tankerville* claimed under Sir *John Astley*, or only under Lady *Astley*. Lord *Mansfield* said, that justice was strongly with the plaintiff. That it was true, a fine and a deed to lead the uses, were to be considered as one conveyance; but that, as Sir *John Astley* was a necessary party to the second declaration of uses, by which the estate was limited to Lord *Tankerville*, his Lordship certainly claimed under him, within the meaning of this covenant. That, undoubtedly, Sir *John* had covenanted against his own acts, and that the new limitations were created by one of his acts.

Vide Butler
v. Swinerton,
Palm.
339.

Or by his
Default.

Howes v
Brushfield,
3 East. R. 491.

§ 52. Where a person conveyed an estate, and covenanted with the vendee for quiet enjoyment, without any eviction or interruption by the vendor, or any person claiming under him, or by, through, or with, his, their, or any of their acts, means, default, or procurement, and a quit rent was payable out of the lands, which became due before the vendor came into possession, but was in arrear at the time of the sale, it was held to be a breach of the covenant; and Lord *Ellenborough* said, that if it were in arrear in the vendor's lifetime, it was a consequence of law that it was by his default, that is, by his default in respect of the party with whom he covenanted, to leave the estate unincumbered.

Covenants for
Production of
Title-Deeds.

Fearne Id.
114.

Napper v.
Allington,
1 Ab. Eq. 166.

§ 53. Where the title-deeds of an estate are retained by the vendor, which frequently happens, either because they relate to a larger estate than that which is sold, or for other reasons, the purchaser is entitled to a covenant for the production of them. And this covenant, being real, will run with the land, and extend to all future purchasers of it. But, if the deed, containing such covenant, be not delivered to a future purchaser, then he will be entitled to a new covenant from his vendor for the production of the title-deeds.

What Cove-
nants where
the Title is
defective.
1 Inst. 384 a.
n. 1.

§ 54. Where there is a defect in the title, the purchaser has a right to covenants against all persons, claiming a lawful title to the estate. And Mr. *Butler* has justly observed, that, where a purchaser consents
to

to take a defective title, relying for his security on the vendor's covenant, this should be particularly mentioned to be the agreement of the parties : for, otherwise, as the defect was known, it may be contended, that the covenants for the title should not extend to warrant it against such particular defect.

§ 55. Where a purchaser, whose title is secured by covenants of this kind, is evicted by any person claiming under the vendor, or any of his ancestors, the purchaser may maintain an action at law upon the covenants, for the restoration of his purchase-money. And, where a defect is discovered in the title, which may be supplied by the vendor, he will be compelled, in equity, to do whatever is necessary to amend such defect.

Remedies
under these
Covenants.

§ 56. Where a husband covenants that his wife shall join with him in levying a fine, the Court of Chancery will decree the husband to do it ; because it must be presumed, that the husband has first obtained his wife's consent for that purpose : and the interest in such covenant has been taken to be an inheritance descending to the heir of the covenantee. But Mr. Cox observes, that if it can be made appear to have been impossible for the husband to procure the concurrence of his wife, it cannot be supposed that the court would decree an impossibility ; especially, if the husband offers to return all the money, with interest and costs, and to answer all the damages.

3 P. W. 189.
Note (B.)

1 Inst. 384 a.
n. 1.

§ 57. Where there is any fraud or concealment practised by the vendor, the purchaser may bring an action on the case, in the nature of an action of deceit. But Mr. *Butler* observes, that a judgment, obtained after the death of the vendor, in an action of this kind, can only charge his personal property as a simple contract debt, and will not, except under very particular circumstances, affect his real assets. A bill in Chancery will, therefore, in most cases, be found a better remedy : it will lead to a better discovery of the concealment, and the circumstances attending it ; and may, in some cases, enable the court to create a trust in favour of the injured purchaser.

Treat. of Eq.
B. L. c. 5. f. 8.

Nelf. Cha.
Rep. 118.
2 Ab. Eq.
678. pl. 1.

§ 58. Mr. *Fonblanque* observes, that the circumstance of a court of equity requiring the vendor, in such case, to be affected with such fraudulent concealment, raises a strong presumption, that, without proof of it, the purchaser could not have been relieved. And, in the case of *Harding v. Nelthorpe*, such proof was required, and an issue was directed, to ascertain whether the vendor did or did not know of the incumbrance, which affected the land, but to which his covenant did not extend.

§ 59. The court of chancery will not, however, compel the performance of a covenant for farther assurance, unless the transaction be free from all objection.

Johnson v.
Nott. 1 Vern.
271.

§ 60. An heir sold the reversion of a house, in the lifetime of his father, at an under value ; but, being
only

only tenant in tail, he covenanted to make farther assurance. Upon a bill in Chancery for a specific performance of this covenant, the court refused to interfere, and left the plaintiff to his remedy at law.

§ 61. If the express covenants for the title be not broken, the purchaser's money cannot be recovered back at law.

§ 62. An administrator, having found among the papers of the deceased a mortgage for 1,200*l.*, assigned it over to a stranger, in consideration of the said sum of 1,200 *l.*, which was paid to him : and, in the deed of assignment, the administrator covenanted, that neither the deceased, nor the administrator, had done any act to incumber the mortgaged estate.

Bree v. Hol-
bech, Doug.
654.

The mortgage-deed turned out to have been forged ; and, after six years had elapsed, the assignee brought an action of *assumpsit* against the administrator, for money had and received to the plaintiff's use. The defendant pleaded the general issue, and the statute of limitations. The plaintiff replied, and stated, that the recitals in the indenture of assignment were false, inasmuch as there never was any indenture of mortgage ; and that, by fraud and imposition, the plaintiff was induced to pay the said sum of 1,200 *l.* To this replication, the defendant demurred generally.

Lord Mansfield.—“ The basis of the whole argument is fraud ; and the question is, whether fraud is any where asserted in this replication. There
“ may

“ may be many cases, where the assertion of a false
 “ fact, though unknown to be false to the party mak-
 “ ing the assertion, will be fraudulent ; as, in the case
 “ of Sir *Crisp Gascoyne*, who insured a life, and af-
 “ firmed it was as good a life as any in *England*, not
 “ knowing whether it was or was not. There may
 “ be cases too, which fraud will take out of the sta-
 “ tute of limitations. But, here, every thing alleged
 “ in the replication may be true, without any fraud
 “ on the part of the defendant. He is administrator
 “ with the will annexed, who finds a mortgage deed
 “ amongst the papers of his testator, without any ar-
 “ rears of interest, and parts with it *bonâ fide*, as a
 “ marketable commodity. If he had discovered the
 “ forgery, and had then got rid of the deed as a true
 “ security, the case would have been very different.
 “ He did not covenant for the goodness of the title, but
 “ only, that neither he, nor the testator, had incum-
 “ bered the estate. It was incumbent on the plaintiff
 “ to look to the goodness of it.”

Treat. of Eq.
 Vol. i. 364 n.

§ 63. A court of equity proceeds, in cases of this
 kind, upon the same principle as a court of law : for,
 unless there is fraud in concealing the defect in the
 title, the court will not interfere.

Urmston v.
 Pate, in
 Chan.
 1st Nov. 1794.

§ 64. *William Davy* devised certain estates to his
 son, *William Davy*, for life, remainder to his first and
 other sons in tail male, remainder to Sir *Robert Lad-*
broke and *Lyde Browne*, their heirs and assigns for
 ever, as tenants in common ; and gave and devised all
 the

the residue of his real estate to his brother *William Pate*, his heirs and assigns for ever.

Sir *Robert Ladbroke* died in the lifetime of *William Davy* the testator. *William Davy* junior entered upon the estates, and died without issue, having devised his estates to *John Minuyer*, *Robert Pate*, and *Thomas Butler*, to sell.

William Pate, the residuary devisee in the will of *William Davy* the father, devised his reversion, expectant on the death of *William Davy* junior, to *Robert Pate* in fee. *Barwell Browne*, the heir of *Lyde Browne*, and *Robert Pate*, (who conceived himself, as residuary legatee in the will of *William Davy* the father, to be entitled to the moiety devised to Sir *Robert Ladbroke*, and which became lapsed by his death in the lifetime of the testator), sold the estate for a valuable consideration to *Urmston* the plaintiff.

The conveyance to *Urmston* recited the will of *William Davy* the father, the death of Sir *Robert Ladbroke* in the lifetime of the testator, the death of *William Davy* the son without issue, and that *William Pate*, the residuary devisee in the will of *William Davy* the father, had made his will, reciting that, in case of the death of *William Davy* the son without issue, he would become entitled to the moiety of the estate devised to Sir *Robert Ladbroke*, and had, by his said will, given the reversion of his said moiety to his son (the defendant) in fee: and there was inserted in it a covenant, that, notwithstanding any act done by the defendant

or his ancestors, or any person claiming under him or them, he was seised in fee of the premises. The purchaser, finding *Robert Pate* had no title to the moiety conveyed to him, (it having descended to *William Davy* the son as heir to his father, and belonging now to his devisees,) filed a bill in chancery, praying that his purchase-money might be restored to him.

The defendant, *Robert Pate*, demurred to the bill for want of equity, and the demurrer was allowed.

Who are
bound to en-
ter into these
Covenants.

§ 65. All persons, who convey lands whereof they are seised to their own use, are bound to enter into the usual covenants for the title of the lands conveyed. But persons, who convey as trustees or under powers, as they are not beneficially interested in the sale, are not obliged to enter into any covenants, except that they have done no act to incumber the estate; or to destroy the power under which they convey.

§ 66. When the practice of conveying or devising lands to trustees, in trust to sell, became frequent; it was laid down as a rule among the conveyancers, that the persons entitled to the money, arising from the sale of the lands, were bound to enter into the usual covenants, for the title; because, as such persons had the beneficial interest in the land, they ought to be considered in equity as the owners thereof.

This doctrine was confirmed in the following case.

§ 67. Mr.

§ 67. Mr. *Thomas Lloyd* devised certain estates in the isle of *Anglesea*, and county of *Carnarvon*, to trustees; upon trust, out of the rents thereof or by selling or mortgaging the same, to raise such sums as should be sufficient to discharge a mortgage, affecting an estate, which the testator had settled by deed on Mrs. *Hester Webb*, as well as all his just debts. Upon a bill for carrying the trusts of this will into execution, the estates in *Anglesea* and *Carnarvon* were sold for 27,000*l.*; and a draft of the conveyance was prepared by Mr. *Booth*, the purchaser's counsel; to which Mrs. *Webb* was a party, and made to enter into the usual covenants for the title. The counsel for the grantors, Mr. *Weldon*, together with two other conveyancers, Mr. *Lane* and Mr. *Fazakerly*, objected to the draft; and gave their opinion, that Mrs. *Webb* was not bound to enter into covenants for the title. The draft was again referred to Mr. *Booth*, who supported his former opinion; and contended that, where a man devised an estate to trustees, upon trust to sell and pay over the money to J. S. and the trustees contracted with a purchaser for the sale of the estate; there, J. S. the devisee of the money, who had the real beneficial interest in the estate, must covenant for the title; and that this was every day's practice. The Master, to whom the draft of the conveyance was referred, reported, that Mrs. *Webb* was not bound to enter into covenants for the title. Upon exceptions being taken to this report, Lord *Hardwicke* made the following order:—

Lloyd v. Griffiths,
3 Atk. 236.

“ Let

“ Let the exception be allowed; and let the Master
 “ alter the draft of the conveyance prepared and
 “ certified by him, by inserting therein *proper cove-*
 “ *nants from Mrs. Hester Webb against her own acts,*
 “ *and the acts of Mr. Thomas Lloyd her devisor, as*
 “ to so much as she will be benefited by the estate.”

§ 68. The rule, established in the above case, has been in some degree weakened by the following modern determination.

Duchess of
 Rutland v.
 Wakeman,
 Dom. Proc.
 1798.
 8 Bro. Parl.
 Ca. 145.

§ 69. *Thomas Eyre* devised the manor of *Eastwell* to *William Wakeman* and *Vincent Eyre*, their heirs and assigns; upon trust to sell the same, and to apply the money in payment of his debts and legacies, and to place out the residue on public or private securities. The interest (after satisfying two small annuities) to his wife lady *Mary Eyre* for life, and, after her death, two fifths to *James Eyre* for life, two other fifths to *Charles Eyre* for life, and the remaining fifth to *Mary Eyre* for life; the principal to go to the children of the said *James, Charles, and Mary Eyre*.

The appellant, as guardian of the Duke of *Rutland* her son, contracted for the purchase of this estate, with the devisees and trustees of *Thomas Eyre*; and insisted that lady *Mary Eyre, James and Charles Eyre, and Mary Eyre*, should covenant for the title, as far as they were benefited by the sale.

3 Ves. Jun.
 233. 504.

This was refused by the respondents; and it was decreed by the Court of Chancery, that the appel-
 lants

lants should accept a conveyance without those covenants.

Upon an appeal from this decree, it was contended on behalf of the appellants, that lady *Mary Eyre*, *James Eyre*, *Charles Eyre*, and *Mary Eyre*, were necessary parties to the bill; because the appellants were intitled to have covenants for the title from them to the extent of the benefit, which they derived from the sale.

That, from the words and purport of the contract, they were entitled to such covenants; and they were advised, that a proper conveyance could not be made without them. The agreement was, not to purchase the vendor's title, but *a good title* to the estate: and, as the conveyance by lease and release passes only what the vendors can legally convey, and contains no warranty; the purchaser cannot be assured of a good title, nor guarded against latent incumbrances, without such covenants.

If the devise had been to the respondents themselves, for their own use and benefit, subject to the payment of debts and legacies, and they had contracted to sell, they must have covenanted with the purchaser for the title; as it would, in that case, have been their estate. Upon the same principles the devisees of the purchase money, after payment of debts, were compellable to enter into similar covenants, to the extent of their respective interests: for it was in substance their estate, and they might pay off the incumbrance, and prevent the

the sale. It was impossible to say there was no risk : if there was any, those persons should indemnify against it, who were paid as for a perfect title.

The above case of *Lloyd v. Griffiths* was stated : and it was said that the decision in that case, and the principles therein laid down, had never been controverted ; but, on the contrary, had been the rule adhered to and pursued in practice by every conveyancer of that time.

It might be objected, that purchasers would have an equal right to call upon simple contract creditors, whose debts were by will charged on the real estate, to covenant for the title ; and that in sales under the crown, or by the assignees of bankrupts, there were no covenants.

To which it was answered, that with respect to simple contract creditors, whose debts were charged by the will upon the real estate, they could not be considered as volunteers, and standing in the place of the testator ; and the course and practice of conveyancing had been, not to require that they should be parties to the conveyance, or enter into any covenants. The argument, therefore, in this case could not imply, on the part of the vendors, any undertaking for such covenants, and the appellants did not require what it was *unusual* to grant. As to contracts for the purchase of an estate from the crown, or from the assignees of a bankrupt, the party, who contracts to buy, is apprised at the time he enters into the contract, that

that he can have no covenants for the title; and, therefore, in these cases there is no breach of agreement on the part of the *vendees*, which made them perfectly distinct from the present. Besides, the cases last mentioned were *exceptions* to the *general rule*; and could not therefore be urged to prove its *non-existence*.

On the other side it was contended, that the appellants were not entitled to any other covenants than such, as were usually entered into by trustees, and a disinherited heir at law. If it were adopted as an established principle, that the persons beneficially interested in the monies, arising from the sales of estates circumstanced as the estate in question was, were necessary parties to the conveyance of such estates; and that they must enter into covenants for the title in proportion to the interest they respectively claimed in the purchase monies, the inconvenience would be without measure, and the execution of numberless trusts rendered impossible. It would extend to all sales from the assignees of bankrupts; to all sales by trustees for the payment of debts, where the creditors were not named, and frequently could not be found, until after it might be necessary to sell the estate; to all sales where infants were, and unborn persons were, when born, to be interested in the purchase money in any degree; and even to sales under decrees of courts of equity. Besides, if the covenants required could be insisted upon, it was easy to conceive the impossibility, in many cases, and the difficulty and expence, in most cases, of ascertaining the quantum of damages

to be answered by the covenantor, his heirs, executors, administrators, or assigns, at perhaps very distant periods of time. Many more objections must necessarily occur to any one conversant with the subject. It had been urged that the legatees, chiefly interested in the purchase money, ought to covenant to the value of their interest: but the rule and principle, upon which the court was to act, could not possibly depend on the quantum of the legacy, which a party took. Every simple contract creditor, whose debt was paid out of money arising from the sale of land, charged with simple contract debts, in fact, receives payment of his legacy, under the effect of that will. If any of the legatees are compellable to covenant for the title, all of them must be compellable to covenant in respect of the value of their legacies, whether vested, contingent, remote, to be presently paid, or to be paid in future, to be enjoyed in gross, or to be taken by persons born and unborn in succession; and every simple contract creditor, who could not have his debt paid, if the will had not charged the land purchased, and who, under the will takes before legatees, must also be compellable to covenant to the value of his debt.

Such covenants, therefore, as were then required, must be mischievous; principle could not require that they should be inserted; and in practice they were seldom inserted in conveyances by trustees of estates, devised to them to be sold.

In the present case, the purchasers knew they were contracting with such trustees; and of course they purchased with notice that they could only expect to have from those, with whom they contracted, such covenants as were, in the ordinary course of business, entered into by trustees, and a disinherited heir at law, in case he was willing to join in the conveyance. And they further knew the almost utter impossibility, in the present case, of procuring some of the persons beneficially interested in the purchase money, to execute the proposed conveyance, on account of their residence beyond the seas; and there was nothing in this case, which calls for a deviation from the common course of business. The title was clear; and there was no fair objection which could be made against it.

The decree was affirmed with 200 *l.* costs.

§ 70. The eighth and last part of a deed is the Conclusion, which mentions the execution of the deed, and the date, either expressly or by reference to some day and year previously mentioned.

TITLE XXXII.

D E E D.

CHAP. VI.

Of a Feoffment, Gift, and Grant.

- | | |
|--|--|
| <p>§ 1. <i>Different Kinds of Deeds.</i>
 3. <i>Of a Feoffment.</i>
 7. <i>Of Livery of Seisin.</i>
 21. <i>Who may convey by Feoffment.</i>
 26. <i>A Feoffment cannot commence in futuro.</i>
 28. <i>Operation of a Feoffment.</i>
 29. <i>Transfers the Freehold by Disseisin.</i></p> | <p>§ 32. <i>Creates a Discontinuance.</i>
 33. <i>And also a Forfeiture.</i>
 34. <i>Of a Gift.</i>
 35. <i>Of a Grant.</i>
 39. <i>No technical Words necessary.</i>
 41. <i>Who may convey by Grant.</i>
 43. <i>Operation of a Grant.</i></p> |
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Section 1.

Different
Kinds of
Deeds.

HAVING discussed the general nature of deeds, it will now be necessary to consider the several kinds which are known to the law, together with their various incidents and qualities. All deeds by which lands may be conveyed or charged derive their effect, either from the common law, or from the statute of uses. Of those which derive their effect from the common law, some may be called original or primary, which are those by means whereof the estate is originally created or arises. Others are derivative or secondary, whereby an estate already created, is enlarged, restrained, transferred, or extinguished. And there is a third class which are used, not to convey, but to charge or incumber lands, and to discharge them again.

§ 2. The

§ 2. The original conveyances deriving their effect from the common law, are, 1, A feoffment. 2, A gift. 3, A grant. 4, A lease. 5, An exchange. 6, A partition. The derivative conveyances are, 1, A release. 2, A confirmation. 3, A surrender. 4, An assignment. 5, A defeazance. Deeds which operate to charge or discharge lands are, 1, A bond. 2, A recognizance. 3, A defeazance on a bond.

§ 3. A feoffment, *feoffamentum*, is a substantive derived from the word *feoffare*, or *infeudare*, to give one a fief or feud; and therefore a feoffment was properly, *donatio feudi*, and Lord Coke says, the ancient writers called a feoffment *donatio*, from the verb *do* or *dedi*, which is the aptest word of feoffment.

Of a Feoffment.
1 Inst. 9 a.

§ 4. A feoffment is evidently taken from the *breve testatum* of the feudal law, and the proper and original meaning of the word feoffment was, the gift of a feud. But by custom it came afterwards to signify a gift of a free inheritance or *liberum tenementum*, to a man and his heirs, respect being had, rather to the perpetuity of the estate granted, than to the tenure.

Ante ch. 1.,
f. 21.

Mad. Form
Dissert. 4.

§ 5. A charter or deed of feoffment must be sealed and delivered in the same manner as other deeds. And although no technical words are necessary to constitute a feoffment, yet the proper and usual words are, give, grant, and enfeoff.

§ 6. A feoffment can only be made of corporeal hereditaments of which the actual possession may be

1 Inst. 9 a.
49 a.

delivered to the feoffee; and therefore corporeal hereditaments are frequently spoken of in law by the name of things that lie in livery.

Of Livery of
Seisin.

1 Inst. 48 a.

§ 7. The mere signing and sealing a deed of feoffment, was, however, in no instance sufficient to transfer an estate of freehold from one person to another, unless the possession was formally delivered by the feoffor to the feoffee, which was called livery of seisin, and without which a deed of feoffment only passed an estate at will; and this still continues to be the law.

5 Rep. 84 b.
Plowd. 302.

§ 8. Livery of seisin is in fact exactly similar to the investiture of the feudal law, and was adopted in *England* for the same reason, namely that the proprietor of each piece of land should be publicly known, in order that the lord might be always certain on whom he was to call for the military services that were due for the land; and that strangers might know against whom they were to bring their *præcipes*.

Lit. f. 418.
Perk. f. 226,
227.

§ 9. Where the lands comprised in a feoffment are all situated in the same county, though in different vills, livery of seisin of those within one vill, in the name of all, will be good. But where the lands lie in different counties, there must be a livery in each county; unless they are all comprised within a manor, for there livery of the manor in one of the counties will be sufficient.

§ 10. As livery of seisin is the delivery of the actual possession, it follows that no person can give livery of seisin who has not at the moment the actual possession. And therefore where a person makes a feoffment of lands which are let on lease, he must obtain the assent of the lessee to the livery. And in cases of this kind the practice formerly was, for the lessee to give up the possession for a moment to the lessor, in order to enable him to give livery.

Bettisworth's
Case,
2 Rep. 31 b.

§ 11. Livery of seisin is of two kinds, livery in deed, and livery in law; livery in deed is the actual delivery of the possession, where the feoffor comes himself upon the land, and taking the ring of the door of the principal messuage, or a turf or a twig, delivers the same to the feoffee in the name of seisin. Or it may be made by words only without the delivery of any thing, as if the feoffor be upon the land, or at the door of the house, and says to the feoffee, I am content that you should enjoy this land according to the deed, this is a good livery to pass the freehold. For the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor on the land, are a sufficient indication to the people present of the change of the possession.

1 Inst. 48 a.

Sharp's Case,
6 Rep. 26.

§ 12. If a man merely delivers a deed of feoffment on the land, this will not amount to livery of seisin, for it hath another operation to take effect as a deed; but if the feoffor delivers the deed upon the land in the name of seisin of all the lands contained in the deed, this will be a good livery,

Through-
good's Case,
9 Rep. 136,

1 Inst. 48 b.

§ 13. Livery in law is where the feoffor is not actually on the land, or in the house, but being in sight of it, says to the feoffee, I give you yonder house or land, go and enter into the same and take possession of it accordingly. This sort of livery seems to have been made at first only at the courts baron, which were anciently held in the open air, on some spot in the manor, from whence a general view might be taken of the whole; and the *pares curiæ* could easily distinguish the land which was to be transferred,

Idem.

§ 14. Livery in law does not however transfer the freehold until an actual entry is made by the feoffee, because the possession is not delivered to him, but only a licence or power given him by the feoffor to take possession; and therefore if either the feoffor or feoffee die before an entry is made under the livery thus given, it becomes void,

Parson, v.
Petit,
2 Salk. 165.

§ 15. A man and a woman were joint-tenants in fee, and the woman made a livery in view to the man by the words—Go and enter into possession, but before it was executed she married the feoffee.

It was argued that this feoffment was void, because there was no actual entry pursuant to the livery, and that by the subsequent marriage, the feoffee was seised in right of his wife, and could not by his entry work any prejudice to her right. But it was adjudged that he might enter at any time; for he had not only an authority so to do, but an interest passed by the livery in

in view, by which act the woman did all which was in her power to do.

§ 16. If in a case of this kind the feoffee dare not enter upon the land, without endangering his life, he must claim the land as near as he may safely venture to go, and this will be sufficient to vest the possession in him, and to render the livery within view perfect and complete; for no one is obliged to expose his life for the security of his property. But when he has gone as far as he may with safety, the law very reasonably looks on such intention to be as effectual as the act itself. For otherwise it might be in the power of a stranger by an act of violence of his own, to deprive another of his right, and thereby to derive an advantage from an unlawful act. 1 Inst. 48.b.

§ 17. Livery of seisin may be given and received by attorney, but the authority to give or receive livery must be by deed, that it may appear to the court that the attorney had a power to represent the parties, and that such power was properly pursued. Lit. f. 66. 1 Inst. 52 a.

§ 18. A deed of feoffment was made to three, *habendum* to two for their lives, remainder to the third for his life; and livery of seisin was made to all three *secundum formam chartæ*. The question was, whether livery so made, as if they had all estates in possession, whereas in truth one of them had but an estate in remainder, was good. The court was of opinion that the livery was good to two for their lives, remainder to the third. And the Chief Justice said, that Norris v. Trist, 2 Mod. R. 78.

that whatever the ancient opinions were about pursuing authorities with great exactness and nicety, yet this matter of livery upon indorsements of writing was always favourably expounded of later times, unless where it plainly appeared that the authority was not pursued at all. As if a letter of attorney was made to three jointly and severally, two could not execute it, because they were not the parties delegated; they did not agree with the authority.

1 Inst. 52 a.

§ 19. Livery of seisin under a power of attorney must be made during the lifetime of the feoffor; for the power ceases by his death.

Jackson v.
Jackson,
Fitzg. R. 146.

Burgh v.
Francis,
Fin. 28. 174.

§ 20. A court of equity will presume livery of seisin to have been made, though not indorsed on the deed, where the possession has gone according to the feoffment for a great length of time; and in some cases has even supplied the want of livery.

Who may
convey by
Feoffment.

§ 21. All those who are capable of conveying their lands by deed, may make a feoffment: and some persons may bind themselves to a certain degree by feoffment, though not by any other kind of deed.

Lit. l. 406.

§ 22. Thus if an idiot or lunatic make a feoffment, and give livery of seisin in person, it will bind him, so that he cannot by any process or plea avoid it, and restore himself to the possession. The reason is, because the livery being formerly made before the *pares curie*, their solemn attestation of the change of possession could not be defeated by the person himself, it being

being presumed that they were competent judges of the feoffor's ability to make the feoffment.

§ 23. If an infant makes a feoffment and gives livery of seisin in person, it is not void, but only voidable; for there must be some act of notoriety to restore the possession to him, equal to that by which he transferred it,

§ 24. Where an infant, idiot, or lunatic, made a feoffment and delivered seisin in person, it was held that it barred the lord of his escheat; for though it might have been avoided by the heir of the infant, idiot, or lunatic, because he was privy in blood, yet it could not be avoided by a person who was only privy in estate.

Whittingham's Case,
8 Rep. 42.
4 Rep. 125 a.
Tit. 30. f. 18.

§ 25. But if an idiot, lunatic, or infant, executes a feoffment, and a power of attorney to give livery of seisin, and livery is given accordingly, the whole is void; because the power of attorney is void.

4 Rep. 125 a.

§ 26. A feoffment cannot be made to commence *in futuro*, and therefore if a person makes a feoffment to commence on a future day, and delivers seisin immediately, the livery will be void, and nothing more than an estate at will passes to the feoffee. This doctrine is founded on two reasons, 1st, Because the object and design of the ceremony of livery of seisin would fail, if it were allowed to pass an estate to commence *in futuro*; as it would in that case be no evidence of the change of possession. 2d, The freehold would be in

A Feoffment cannot commence in futuro.
1 Inst. 217 a.
2 Will. R. 166.

Tit. 1. f. 47. in abeyance which is never allowed where it can, by any means, be avoided.

§ 27. An estate may, however, be created by feoffment to commence *in futuro*, by way of remainder; as where a lease is made to *A.* for three years, remainder to *B.* in fee. Here livery of seisin must be given to *A.* by which means the freehold is immediately created, and vested in *B.* during the continuance of *A.*'s estate for years.

Operation of
a Feoffment.

1 Inst. 9 a.
Shep. T. 203.

§ 28. The operation of a feoffment is in some instances stronger than that of any other conveyance. Thus Lord *Coke* says that a feoffment, “cleareth all
“ disseisins, abatements, intrusions, and other wrong-
“ ful or defeasible estates, where the entry of the
“ feoffor is lawful; which neither fine, recovery, nor
“ bargain and sale by deed indented and inrolled,
“ doth.”

Transfers the
Freehold by
Disseisin.

§ 611. 698.
2 Inst. 244.

§ 29. The most singular and powerful effect of a feoffment is, that it operates on the possession, without any regard to the estate or interest of the feoffor; so that to make a feoffment good and valid, nothing is wanting but possession. Thus *Littleton* says that if a tenant for life, or years, makes a feoffment in fee with livery of seisin, it will give an estate in fee, and operate as a disseisin of the real owner.

§ 30. The principles upon which this doctrine is founded, are thus explained by Mr. *Butler*. By the old law no person who had an estate of less duration
and

1 Inst. 330 b.
2. 1.

and extent than for his own life, or for the life of another, was considered as a freeholder; and none but a freeholder was deemed to have possession of the land. It is true that estates were sometimes held for years; in that case the possession of the tenant for years was considered to be the possession of the freeholder, but still the tenant for years held the possession, though he held it for the freeholder, and the freeholder by trusting the termor with it, exposed himself to lose it by the termor's negligence or treachery. If the termor left the possession vacant, if he permitted himself to be disseised of it, if he undertook to alien it, either by act in *pais*, or by matter of record, if he claimed the fee, or if he affirmed it to be in a stranger; in all these cases the freeholder exposed himself to the loss of the possession, as much as if they were his own acts. Thus the termor held the possession, but he was said to hold it *nomine alieno*, in contradistinction to the freeholder himself, who was said to hold it *nomine proprio*. Hence *Britton* expressly defines an estate of freehold to be "The possession of the soil by the freeholder;" and the author of *Doctor and Student* says, that the possession of the land is called in the law of *England* the franktenement or freehold; so nearly synonymous in those days were the words possession and freehold. In this manner the possession of a termor differed from that of a mere bailiff, who had no possession.

Ch. 52.

B. 2. D. 12.

Idem.

§ 31. The same principles obtained respecting the transfer of the freehold. Nothing farther was necessary, than a delivery of the possession, or, as it was called

called by the law writers, livery of seisin, the freehold could be transferred by no other means. But, here, a difference is to be observed, with respect to the effect of the livery of a tenant for years, and the livery of a mere bailiff. On account of the solemnity upon which the entry of the tenant for years was grounded, the connection between him and the reversioner, and his actually holding possession of the land, (though he held it for the freeholder), the livery of the former was a transfer of the possession and fee-simple, but that of the latter had no effect. Thus, by the old law, on the one hand, the freehold could not be transferred but by livery of seisin; on the other, livery of seisin could not be made by any person who had the possession, without transferring the fee-simple.

Taylor v.
Horde.

The doctrine above stated has been, in some respects, denied in a modern case; of which, an account will be given in Title 36. Recovery.

Creates a
Discontinu-
ance.
1 Inst. 327 b.

Tit. 29. c. 1.
f.

§ 32. A feoffment by a tenant in tail, who is actually seised by force of the intail, creates a discontinuance of the estate tail, by transferring to the feoffee not only the possession, but also the right of possession, so as to take away the right of entry of the issue in tail, and of the persons in remainder and reversion, and to drive them to their real action.

And also a
Forfeiture.

Tit. 3. f. 97.

§ 33. A feoffment by a particular tenant will create a forfeiture of his estate, because it transfers the fee-simple, and divests the remainder or reversion.

§ 34. A gift

§ 34. A gift, *donatio*, is properly applied to the creation of an estate tail, as a feoffment is to that of an estate in fee-simple. It differs in nothing from a feoffment, but in the nature of the estate passing by it, and livery of seisin must be given, to render it effectual.

§ 35. A grant is a conveyance so far similar to a feoffment, that the operative words are *dedi et concessi*, given and granted. And as a feoffment was the regular mode of conveying corporeal hereditaments, so, a grant was the proper mode of conveying incorporeal hereditaments. Hence the expression, that advowsons, rents, commons, &c. lie in grant.

§ 36. As the objects of a grant are not capable of corporeal delivery, it follows, that livery of seisin cannot be given upon a grant; but still it was always held, that a grant, accompanied with the attornment of the tenant, was equally valid with a feoffment and livery of seisin.

§ 37. Although a feoffment might formerly have been made by parol only, yet a grant could not, in general, be made without deed; because, as the possession of those things, which were the subject matter of a grant, cannot be transferred by livery, there could be no other evidence of a grant but the deed.

§ 38. By the old law, no grant was good without the attornment or consent of the tenant, but, now, the necessity of attornment is taken away.

§ 39. The

No technical
Words neces-
sary.

1 Inst. 147 a.

§ 39. The proper and technical words of a grant are, *dedi et concessi*, hath given and granted; but any other words that shew the intention of the parties, will have the same effect.

Holmes v.
Sellers, 3 Lev.
305.

§ 40. *A.* entered into an article with *B.*, by which he agreed, that, in consideration of a certain rent, *B.* should have a way for himself and his heirs over certain lands of *A.* This was held to be a good grant of a right of way, and not merely a covenant for enjoyment.

Who may
convey by
Grant.

§ 41. Every person who has a present estate or interest in lands, in remainder or reversion, may convey it away by grant, because estates in remainder and reversion consist in right only. So every one may grant away any incorporeal hereditament, such as an advowson, a rent, common, &c. But a bare right or possibility cannot be granted.

Peck. l. 65.

§ 42. A person cannot, however, grant or charge that which he hath not; and, therefore, if a man grants a rent-charge out of the manor of *Dale*, when, in truth, he hath nothing in the manor, and afterwards purchases it, he shall hold it discharged from this grant.

Operation of
a Grant.

§ 43. As to the operation of a grant, it is materially different from that of a feoffment, for, we have seen, that a feoffment operates immediately on the possession, without any regard to the estate or interest of the feoffor. But a grant only operates on the estate
of

of the grantor, and will pass no more than what the grantor is by law enabled to convey. This rule, probably, arose from the circumstance, that a grant being always made by deed, the estate of the grantor might be known by inspection of the deed; and, if the estate granted was greater than the estate which the grantor had, it was merely void, and the grant only passed as much as the grantor could really give.

§ 44. Lord Chief Baron *Gilbert* seems to have been Ten. 122. of opinion, that the reason why a grant passes no more than the grantor can lawfully give, is, because it is a secret conveyance, and therefore ought not to be allowed to have so extensive an operation as a feoffment, in which livery of seisin is publicly given.

§ 45. A grant cannot, in any case, operate as a 1 Inst. 327 b. discontinuance: but this is rather owing to the nature of the things which are the subject matter of the grant, than to the grant itself; for the subject matter of grants being rights only, they cannot, from their nature, be discontinued.

§ 46. If, therefore, a tenant in tail of a rent, advowson, common, or of a remainder or reversion, expectant on an estate of freehold, makes a grant in fee, this is no discontinuance of the estate tail, for nothing passes but during the life of the tenant in tail, which is not unlawful. Lit. f. 627. 1 Inst. 327 b.

§ 47. It follows, from the same principle, that a 1 Inst. 251 b. grant can in no instance operate as a forfeiture: for a

grant cannot prejudice the person in remainder or reversion, because, if the grantee should claim a greater estate than the grantor can lawfully give, he could make no title to it without the original grant made to his grantor ; by which, it must appear what interest he had, and, consequently, what estate he could convey ; and so the grantee, notwithstanding his grant in fee, could claim no greater estate than his grantor had power to make, and, consequently, the person in reversion could not be prejudiced.

TITLE XXXII.

D E E D.

CHAP. VII.

Of a Lease.

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| <p>§ 1. <i>Description of.</i>
 3. <i>No technical Words necessary.</i>
 5. <i>Must have a certain Beginning and Continuance</i>
 10. <i>May determine on Breach of a Condition.</i>
 11. <i>Who may make Leases.</i>
 12. <i>Joint-Tenants, Coparceners, and Tenants in common.</i>
 13. <i>Tenants in Tail.</i>
 17. <i>Husbands seised Jure Uxoris.</i>
 18. <i>Ecclesiastics seised Jure Ecclesiæ.</i></p> | <p>§ 20. <i>Circumstances required in these Leases.</i>
 41. <i>Tenants for Life.</i>
 44. <i>Tenants in Dower and by the Curtesy.</i>
 45. <i>Tenants for Years.</i>
 47. <i>Guardians in Socage.</i>
 48. <i>Executors and Administrators.</i>
 49. <i>Who are incapable of making Leases.</i>
 50. <i>Infants.</i>
 53. <i>Married Women.</i>
 54. <i>Of void and voidable Leases.</i></p> |
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Section 1.

A LEASE is a contract for the possession and profits of lands and tenements on the one side, and a recompence of rent or other income on the other, or else it is a conveyance of lands and tenements to a person for life or years, or at will, in consideration of a return of rent, or other recompence.

Description
of.

§ 2. Where a freehold estate is created by lease, livery of seisin must be given to the lessee. And where the lease is for a term of years, there must be an entry by the lessee.

Tit. 1. f. 19.

Vide Tit. 8.
ch. 1. f. 14.

No technical
Words neces-
sary.

1 Inst. 45 b.

Bac. Ab. Tit.
Lease (K.)

§ 3. Lord *Coke* says, that the words demise, lease, and to farm let, are the proper technical expressions to constitute a lease. But any other words which sufficiently shew the intention of the parties, that the one shall divest himself of the possession, and the other come into it, for a certain time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease, as effectually as if the most proper and pertinent words had been used for that purpose.

Idem.

§ 4. On the other hand, although the most proper form of words of leasing are made use of, yet, if upon the whole deed, there appears no such intent, but that it is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing that to be a present lease, which was only intended by the parties as an article or agreement for a lease.

Doe v.
Archer,
1 Bosan. &
Pull. 531.

Must have a
certain be-
ginning and
Continuance.
1 Inst. 45 b.

Bac. Ab. Tit.
Lease (L.)

Anon. 1 Mod.
180.

§ 5. No lease is good, unless it contains a sufficient degree of certainty, as to its beginning, continuance, and ending. If a lease be made to begin from an impossible date, as from the 30th of *February*, it will take effect from its delivery; but where the time when a lease is to commence is uncertain, as where a lease was made, *habendum* from the 20th of *November*, without saying what *November*, this uncertainty will render the lease void, because it was part of the agreement, that the lease should commence from the 20th of some *November* or other; but it not appearing to
the

the court what *November* was intended, they cannot determine it for the parties, and, therefore, the lease is void.

§ 6. Lord *Coke* says, where a lease is made, dated 1 Inst. 46 b.,
26th *May*, to commence from the date, or from the day of the date, it shall begin on the 27th day of *May*. If the lease be dated the 26th *May* to hold from the making thereof, or from thenceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from thenceforth, take their first effect. But if it be a *die confectionis*, then it shall begin on the next day after the delivery.

§ 7. This doctrine has been denied; and it has been held, that the word from, may, in the vulgar sense, and even in the strict propriety of language, mean either inclusive or exclusive: and, where the lease can only be supported by construing the word from, inclusive, a court ought to give it that sense. Freeman v. West. 2 Will. R. 165. Vide Pugh v. D. of Leeds, infra.

§ 8. As to the continuance of a lease, it must also have a degree of certainty: but *id certum est quod certum reddi potest*. Therefore a lease for so many years as J. S. shall name, is a good lease for years; for, though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. 1 Inst. 45 b.

§ 9. If a person makes a lease for so many years as he shall live, or, if the parson of D. makes a lease of his glebe, for so many years as he shall be parson there, 1 Inst. 45 b.

these leases are said to be absolutely void, on account of the uncertainty of their continuance. But if a lease be made for 21 years, or any other certain number of years, provided the lessee shall so long live, or continue parson of *D.*, it will be good; for the lease is originally confined to a determinate number of years, though it may determine sooner.

May deter-
mine on
Breach of a
Condition.

Vide Tit. 8.
c. 1. f. 31.
Tit. 13. c. 1.
f. 32.

§ 10. Although a lease must, at its creation, have a precise period fixed beyond which it is not to continue, yet it may determine prior to that period, in consequence of a proviso or condition: and, in all modern leases, there is a proviso, that if the rent is not paid, and no sufficient distress is found on the premises, the lessor may re-enter and enjoy the lands, as in his former estate.

Who may
make Leases.

§ 11. With respect to the persons who are capable, by the common law, of making leases, it may be laid down, that all those who are capable of alienating their property, or of entering into contracts respecting it, may make leases, which will endure as long as their interest in the thing leased, but no longer.

Joint-Ten-
nants, Co-
parceners,
and Tenants
in common.
Tit. 18. c. 1.
f. 53.
1 Inst. 186 b.

§ 12. Joint-tenants, coparceners, and tenants in common, may either make leases of their undivided shares, or else may all join in a lease of the whole to a stranger: and one joint-tenant, or tenant in common, may make a lease of his part to his companion. For this only gives him a right of taking the whole profits, when, before, he had but a right to the moiety thereof;

of; and he may contract with his companion for that purpose, as well as with a stranger.

§ 13. In consequence of the statute *De Donis Conditionalibus*, all leases made by tenants in tail might have been avoided by their issue, or by the persons entitled to the remainder or reversion. But by the statute 32 Hen. 8. c. 28. f. 1. it is enacted, that all leases made for term of years, or for term of life, by any person or persons being of full age having any estate of inheritance either in fee-simple or in fee-tail, shall be good and effectual in the law against the lessors and their heirs.

Tenants in Tail.

§ 14. This statute does not, however, extend to the persons entitled to the remainder or reversion expectant on the determination of an estate tail; so that, where a tenant in tail dies without issue, no lease made by him, though it be pursuant to this statute, will bind the remainder-men or reversioner.

1 Inst. 44.

§ 15. A lease by tenant in tail, which is warranted by this statute, will not create a discontinuance, because an act of parliament, to which every man is a party, allows of such leases; which, if they were tortious, as all discontinuances are, parliament would not allow: and, therefore, if a warranty is annexed to such a lease, it will not make a discontinuance, for it will determine with the lease.

1 Inst. 333 a.
Vaugh. R.
383.

§ 16. But, if a lease for three lives be not warranted by the statute 32 Hen. 8., it will operate as a discontinuance; because it is a greater estate than the tenant

Walter v.
Jackson,
1 Roll Ab,
633.

in tail can make, and passes by livery, which takes the estate from the tenant in tail, and turns it into a reversion in fee, determinable upon three lives.

Husbands
seised *Jure*
Uxoris.

§ 17. It is enacted by the same statute, that all leases made for term of years or life, by persons having an estate of inheritance in right of their wives, or jointly with their wives, of any estate of inheritance made before the coverture, or after, shall be good and effectual in law against the lessors, their wives and their heirs, provided that the wife be made a party to every such lease, and that the lease be made by indenture in the name of the husband and his wife, and she do seal the same, and that the rent be reserved to the husband and wife, and to the heirs of the wife, according to her estate of inheritance in the same; and that the husband shall not in anywise alien, discharge, grant, or give away the same rent reserved, nor any part thereof, longer than during the coverture, except by fine levied by the husband and wife; but that the same rent shall remain, after the death of the husband, to the persons to whom the lands would have gone, if no such lease had been made.

Ecclesiastics
seised *Jure*
Ecclesie.

§ 18. By the common law, leases made by ecclesiastical persons, of the lands whereof they were seised in right of their churches, were, in many cases, not binding on their successors, and, therefore, it was enacted by the statute 32 Hen. 8. c. 28. that all leases for term of years or life, by any person having an estate of inheritance in right of their churches, shall be good and effectual against the lessors and their successors.

§ 19. There

§ 19. There are several other statutes, by which all alienations by ecclesiastical persons of those lands, tenements, and hereditaments, whereof they are seised in right of their churches, are declared void, except leases for 21 years or three lives, which are called *the disabling Statutes*.

1 Eliz. c. 19.
13 Eliz. c. 10.
1 Jac. 1. c. 3.

§ 20. The circumstances required by the statute 32 Hen. 8. and the subsequent statutes, to render leases made by tenants in tail, husbands seised in right of their wives, and ecclesiastical persons, valid and binding on their heirs and successors, are chiefly these.

Circumstances required in these Leases.

§ 21. 1st, All such leases must be by deed indented, and not by deed poll, or by parol. But if the deed be indented, whether it begins with the words this indenture or not, is not material: and, on the other hand, if it be not indented, the calling it an indenture will not make it so.

1 Inst. 44 a.

§ 22. 2d, All such leases must be made to begin from the day of the making thereof, or from the making thereof.

1 Inst. 44 b.

§ 23. 3d, If there be an old lease in being, it must be surrendered or ended within one year next after the making the new lease; and such surrender must be absolute, and not conditional; for then the intention of the statute might easily be evaded by setting up such old lease again, upon breach of the condition.

Idem.

§ 24. A surrender upon condition, that the lessor should make a new lease within a week after, has been held to be good.

§ 25. The

Wilson v.
Carter;
2 Stra. 1201.

§ 25. The lessor of the plaintiff being a prebendary of *Sarum*, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the proviso in the statute 32 *Hen. 8.* because the surrender of the former lease was with a condition that if the then prebendary did not within a week after, grant a new lease for three lives, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone, but the lessee reserved a power of setting it up again. The court after two arguments gave judgment for the defendant, this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here the new lease was made within the week, and from thence it became an absolute surrender both in deed and in law. And the whole was out of the lessee without farther act to be done by him. In the proviso in the statute there was the word ended, as well as surrendered; and could any one say the first lease was not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him.

Thompson v.
Trafford,
Poph. R. 9.

§ 26. A surrender in law by the taking of a new lease, either to begin presently, or on a day to come, seems a good surrender within these statutes; for by taking such new lease, though it be to commence at a future day, the first lease is presently surrendered and gone, and shall not continue good till the day on which the second lease is to commence; but by acceptance of such second lease, the first is immediately determined,

determined, because both leases cannot exist together, and the first cannot be dissolved or surrendered in part, and therefore must be surrendered for the whole.

§ 27. The statute 13 *Eliz.* c. 11. enacts, that all leases to be made by any ecclesiastical, spiritual, or collegiate persons, or others, within the 13 *Eliz.* c. 10. of any lands, &c. whereof any former lease for years is in being, and not to be expired, surrendered, or ended, within three years next after the making of any such new lease, shall be void, and of no effect.

§ 28. 4th, The duration of all leases made under these statutes must not exceed twenty-one years or three lives. But leases for fewer years or lives are good, the intention of these statutes being only to abridge the power of making long and unreasonable leases, by reducing them to a determinate number of years or lives, which they should not exceed: but might be made as much under as the party pleased. 1 Inst. 44 b.

§ 29. If a bishop makes a lease for four lives, and one of them dies in the life of the bishop, so that at his death there are but three lives in being, yet the lease will be void against his successor, for as it was originally void by 1 *Eliz.* no subsequent event can make it good. 10 Rep. 62 a.

§ 30. If a lease be made to *A.* for the lives of *B.* *C.* and *D.* it is a good lease to one for the lives of three other persons, and a lease to three for their lives is Baugh v. Haines, Cro. Ja. 76.

is all one within the intent of these statutes: for in both cases three lives are the measure of the estate created, which is all the statutes require.

8 Rep. 69 b.

§ 31. It appears to be understood that a lease for sixty years, if three lives shall so long live, is good within the statute 32 Hen. 8., for in *Whitlock's* case it was laid down, that if a man has power to make leases absolutely or generally, as the several persons comprised in the statute 32 Hen. 8. have, and a proviso or restraint comes after, as in that act, that such leases shall not exceed twenty-one years, or three lives, there a lease for ninety-nine years determinable on two or three lives was good, within the first part of the act, and not made void by the last part thereof, because it does not exceed the three lives thereby allowed, though it be not directly for three lives. But a lease for ninety-nine years determinable on three lives could not be supported under the disabling statutes of 1 Eliz. and 13 Eliz. for the first part of these acts makes void all estates, gifts, grants, &c. and the last part only saves leases for twenty-one years or three lives, so that a lease of this kind being void by the first part of these statutes, and not within the saving of the last part, being neither for twenty-one years, nor three lives, shall not bind the successor. There is a *quere* added to this passage in *Bacon's Abridgement*.

4 Inst. 44 b.

§ 32. 5th, All leases under these statutes must be of lands, tenements, or hereditaments, whereto resort may be had for the rent reserved thereout by distress.

For

For otherwise the heirs or successors of the lessors would be without any remedy for the recovery of the rent: and therefore these statutes do not extend to things lying in grant, as advowsons, &c. whereout a rent cannot be reserved.

§ 33. It has however been enacted by a modern statute, 5 Geo. 3. c. 17., that leases of tithes or other incorporeal hereditaments alone, may be granted by any bishop or eleemosynary corporation, and the successors shall be entitled to recover the rent, by an action of debt, which in case of a freehold lease they could not have brought by the common law.

*Tit. 28. c. 1.
s. 17.*

§ 34. 6th, There is a proviso in the statute 32 Hen. 8. that it shall not extend, “to any lease of any manors, “lands, tenements, or hereditaments, which have “not most commonly been letten to farm, or oc- “cupied by the farmers thereof, by the space of “twenty years next before such lease thereof made.”

§ 35. The intention of this clause was to prevent the persons enabled by the statute to demise, from making leases of their mansion houses and demesnes, so as to bind their heirs or successors; as that circumstance would have produced a great decay of hospitality.

§ 36. Various opinions have been held upon the construction of this clause. The better of them seems to be that it consists of two parts in the disjunctive, and if either of them be observed it is sufficient to support

*Bac. Ab. Tit.
Lease (E.)*

support the lease. The first is—"which have not
 " most commonly been letten," which is general.
 The other is, "or occupied by the farmers thereof
 " by the space of twenty years, &c." and that the
 most natural and genuine meaning of the word is,
 that the lands to be leased must either be such as have
 been most commonly letten, that is, such as are not
 reputed part of the demesnes, or such as have been
 occupied by the farmers thereof by the space of twenty
 years.

Idem.

§ 37. If lands have been let or occupied for eleven
 years or more, at one or several times within the
 twenty years next before a lease for twenty-one years
 or three lives, it will be sufficient. And a demise by
 copy of court roll will be considered as a sufficient
 letting to farm, within the statute.

§ 38. 7th, The statute 32 *Hen. 8.* further provides
 " that upon every such lease there be reserved yearly
 " during the same lease, due and payable to the lessors,
 " their heirs and successors, to whom the same lands
 " should have come after the death of the lessors, if
 " no lease had been thereof made, and to whom the
 " reversion thereof should appertain, according to
 " their estates and interests, so much yearly farm or
 " rent, or more, as hath been most accustomedly
 " yielded or paid for the manors, &c. so to be letten,
 " within twenty years next before such lease thereof
 " made."

§ 39. It

§ 39. It seems not to be yet fully settled whether a tenant in tail, or a bishop, may make a lease of part of lands which have been usually let for a certain rent, reserving a rent *pro rata*. For it is said that if bishops, &c. have the power of dividing their farms, and leasing them out in smaller parcels, the whole estate is no longer answerable for the whole rent. The security is lessened by such a division, and there may possibly be an entire deficiency of remedy for portions of the rent. But the better opinion appears to be that such leases are good, because the ancient rent is in fact reserved, and otherwise perhaps they could not lease at all, if they had not a power of dividing the great farms*.

§ 40. 8th, The last rule to be observed in respect to leases under this statute, is, that they must not be made without impeachment of waste: for if, as the preamble speaks, long and unreasonable leases are the chief cause of dilapidations, and of the decay of hospitality; much more would they be so, if they were made punishable for waste.

§ 41. Tenants for life cannot make leases to continue longer than for their own lives; and Lord Coke says, that where *A.* lessee for the life of *B.* makes a lease for years by deed indented, and after purchases the reversion in fee; *B.* dieth, *A.* shall avoid his own

Tenants for
Life.
1 Inst. 47 b.

* There is a private act of parliament, 35 Geo. 3. c. 109. to enable the bishop of *Ely*, and his successors, to grant by several leases an estate in the Isle of *Ely*, then held under one lease.

lease,

lease, for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of *B.* But if *A.* had nothing in the land, and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land, and here it worketh only upon the conclusion, and the lessor cannot confess and avoid, as he might in the other case.

1 Inst. 45 a.
Treport's
Case,
6 Rep. 14 b.

§ 42. Where the person in remainder or reversion joins with the tenant for life in making a lease, it is good, and is considered during the life of the tenant for life as his lease, and the confirmation of the remainder man or reversioner. And after the death of the tenant for life, it is considered as the lease of the remainder man or reversioner, and the confirmation of the tenant for life.

Ludford v.
Barber,
1 Term R.
86.

§ 43. It was resolved in a modern case that a lease executed by a tenant for life, in which the reversioner who was then under age was named as a party, but did not execute it, was void on the death of the tenant for life; and that an execution of the lease by the reversioner, two years after the death of the tenant for life, did not make it good.

Tenants in
Dower and by
the Curtesy.

§ 44. Where tenant in dower or by the curtesy makes a lease for years, and dies, it is absolutely determined; for though their estate is *quodammodo* a continuance of the estate of husband or wife, yet it is a continuance of it only for life; and they have no
power

power to contract for, or intermeddle with the inheritance, and consequently their leases or charges fall off with the estate out of which they were derived.

§ 45. As lessees for years may assign or grant over their whole interest, so they may grant it for any fewer number of years than those for which they hold it; and such derivative lessees are compellable to pay rent, and perform covenants according to the terms agreed upon in such derivative leases.

Tenants for Years.

§ 46. By the statute 4 Geo. 2. c. 28. s. 6. reciting that leases for lives or years could not be renewed without a surrender of all the under-leases derived out of the same; it was enacted, that all future renewals of leases for lives or years should be deemed good and valid, without the surrender of any derivative leases.

§ 47. A guardian in socage may make leases for years in his own name, and the lessee may maintain ejectment thereupon, for such a guardian is *quasi dominus pro tempore*. And a testamentary guardian or one appointed pursuant to the statute 12 Geo. 2. c. 24. is the same in office and interest with a guardian in socage.

Guardians in Socage,
2 Roll. Ab.
41.

§ 48. Executors or administrators, as they may may dispose absolutely of terms for years vested in them in right of their testators or intestates, so may they lease the same for any fewer number of years,

Executors and Administrators.

and the rent reserved on such leases will be assets in their hands, and go in a course of administration.

Who are
incapable of
making
Leases.

§ 49. All persons incapable of binding themselves by contracts, such as idiots, lunatics, &c. are of course incapable of making leases.

Infants.

Bac. Ab. Tit.
Lease (B)

§ 50. An infant cannot make a lease of his lands, unless such lease be evidently beneficial to him. And where no rent is reserved, it has been held by some to be *ipso facto* void; while others only look on it as voidable. It appears however to be settled, that if an infant makes a lease for years, he cannot plead *non est factum*, but must avoid it by pleading the special matter of his infancy; which seems to favour the opinion of those who hold that the lease is not absolutely void.

§ 51. If an infant makes a lease reserving rent, it is *prima facie* good, because it is presumed to be for his benefit. But such lease is voidable by the infant, when he comes of age, or by his heir, if he dies under age.

§ 52. If a case of this kind were now to arise, the principle upon which its validity would depend, would be whether it was beneficial or not to the infant: as Lord *Mansfield* has observed, that very prejudicial leases may be made though a nominal rent be reserved; and there may be most beneficial considerations for a lease, though no rent be reserved; and that

an

an infant may make a lease without rent, for the purpose of trying his title.

§ 53. Married women being disabled by the common law, from making any disposition of their possessions, cannot make leases, and therefore the statute 32 *Hen* 8. enables husbands seised in right of their wives to lease their lands, but if the circumstances required by that statute are not observed, such leases are not binding on wives surviving their husbands. And if the wives die in the lifetime of their husbands, their heirs may avoid them.

Married Women.
Antef. :
2 *Sauv.* 180.
n. 9.

§ 54. There are many cases in which leases made by persons having only a particular estate in the lands leased become absolutely void, by the death of the lessor, and others where they are only voidable, by the persons in remainder or reversion.

Of void and voidable Leases.

This distinction is frequently material, for where a lease becomes absolutely void by the death of the lessor, no acceptance of rent, or any other act by the person in remainder or reversion will make it good : whereas if a lease be voidable only, acceptance of rent will operate as a confirmation of it.

1 *Inst.* 211 b.

§ 55. All leases made by tenants in tail, which are not warranted by the statute 32 *Hen.* 8. are voidable by the issue in tail. But if such issue accept of rent or fealty from the lessee, after the death of their ancestor, or bring an action for recovery of the rent, or for waste, these acts will operate as a confirmation

1 *Inst.* 45 b.

of the lease, and the issue can never afterwards avoid it during their life.

Idem.

§ 56. With respect to leases made by tenants in tail, in pursuance of the statute 32 *Hen.* 8. although they are binding on the issue in tail, yet upon the death of the lessor without issue they are absolutely determined; and therefore void as against the persons in remainder and reversion; so that no acceptance of rent by them, will operate as a confirmation of such leases.

Doe v.
Weller,
7 Term R.
478.

§ 57. Leases made by husband and wife, of the wife's estate, though not conformable to the statute 32 *Hen.* 8. are only voidable as to the wife, and therefore acceptance of rent after her husband's death, will operate as a confirmation of such leases.

Tit. Lease
(C.)

§ 58. It is said in *Bacon's Abridgement* to be clearly agreed, that if a husband seised of lands in right of his wife, make a lease thereof, it is only voidable by the wife after her husband's death, and not void. But some doubts are raised respecting this doctrine by Mr. Serjeant *Williams* in his notes on *Saunders**.

2 *Saund. R.*
180. n. 9.

§ 59. All leases made by tenants for life, become absolutely void by their death; so that no acceptance of rent, or other act, by the persons entitled to the

* With respect to the cases in which leases by ecclesiastical persons are void, or only voidable, vide *Bac. Ab. Tit. Lease (H.)*

remainder or reversion, will operate as a confirmation of them.

§ 60. Tenant for life made a lease for 21 years, and died before the expiration of the term. The remainder-man suffered the tenant to remain in possession four or five years, received rent regularly during that time, and then gave him notice to quit, and brought his ejectment. The question was, whether this acceptance of rent by the remainder-man amounted to a confirmation of the lease, or whether, the lease being void, it was incapable of confirmation.

Jenk'ns v.
Church,
Cowp. 482.

Lord *Mansfield*.—This is a void lease, and not voidable only; but if it were merely voidable, the acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation. It cannot be a confirmation, unless done with a knowledge of the title at the time, or unless the remainder-man lies by and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant. But here, it is a void lease; and, in general, a void lease is incapable of confirmation.

§ 61. In a subsequent case, Lord *Mansfield* said, that a lease which was void against a remainder-man, could not be set up by his acceptance of rent, and suffering the tenant to make improvements, after his interest vested in possession.

§ 62. Sir *Michael Newton* being tenant for life, remainder to trustees to support contingent remainders,

Doe v. But-
cher, Doug.
50.

remainder to his first and other sons in tail, remainder to the lessor of the plaintiff for life; Sir *Michael Newton* demised the premises for 99 years, if two persons should so long live. Sir *M. N.* died without issue, and the remainder-man received rent for several years from the lessee, and also heriots; and the lessee laid out considerable sums of money, after the death of the lessor, in improving the lands.

Lord *Mansfield* said, there did not appear to have been any intention, either to confirm the old lease, or to grant a new one, both the lessor of the plaintiff and the defendant had proceeded under a mistake, and had supposed the original lease to be good.

Goodright v.
Humphrys,
cited, Doug.
52 n.

Judgment that the lease was not confirmed,

§ 63. The Court of Chancery has, however, held, that where a remainder-man accepted rent, and suffered the tenant to make improvements, knowing the defect in the lease, he should execute a new lease to the tenant.

Stiles v. Cow,
per, 3 Atk.
692.

§ 64. A tenant for life made a lease of a house (under a power) for 61 years. The lessee assigned over the premises to one *Stiles*, who rebuilt the house. Upon the death of the tenant for life, the remainder-man accepted rent during six years from the tenant, and, during that time, the tenant built new offices.

The remainder-man afterwards brought an ejectment against the tenant, and recovered the possession at law,
the

the lease not being made according to the directions in the power.

The tenant filed a bill in Chancery for an injunction to stay the defendant's proceedings at law, and to be quieted in the possession of the house.

Lord *Hardwicke*.—" Though the acceptance of
 " rent under a lease by issue in tail will bind them,
 " where they claim *per formam doni* from the lessor,
 " yet this alone will not bind the remainder-man in
 " tail, who claims the leasehold estate by purchase :
 " but is a circumstance, however, in favour of the
 " lessee. And when the remainder-man lies by, and
 " suffers the lessee or assignee to rebuild, and does
 " not, by his answer, deny that he had notice of it,
 " all these circumstances together, will bind him from
 " controverting the lease afterwards."

It was decreed, that the defendant should execute a new lease to the plaintiff.

§ 65. Where there is a proviso inserted in a lease, that upon nonpayment of the rent reserved, on a certain day, the lease shall become absolutely void ; and the rent is not paid on the day appointed for that purpose in the lease, no acceptance of rent after will operate as a confirmation of the lease.

1 Inst. 215 a.
3 Rep. 65 a.

§ 66. King *Philip* and Queen *Mary* demised the seat of the priory of *Ravenston*, com. *Bucks*, to *T. Throckmorton*, for 70 years, rendering rent ; with

Finch v.
Throckmor-
ton, Cro.
Eliz. 221.
Poph. R. 25.

a proviso, that upon nonpayment within 40 days after the day of payment, the lease should cease and be void. The rent was not paid within 40 days after *Mich. 9 Eliz.*; but, afterwards, the queen's receiver accepted it, and made an acquittance, as if it had been paid at the day, and received the rent regularly afterwards until *30 Eliz.*, when the queen granted the land to Sir *Thomas Heneage*. The nonpayment of the rent in *9 Eliz.* within the 40 days was found by office, upon which Sir *T. Heneage* entered. The case was argued several times in the Exchequer, and all the Barons agreed, 1st, That the lease became void immediately upon the nonpayment of the rent, for the words were, that, upon nonpayment, the lease should cease and be void; so that the land was discharged of the contract, and the patentee was no longer a termor, nor, as *Manwood* said, a tenant at will or at sufferance. 2d, That the acceptance of rent afterwards could not make a void lease good. A writ of error was brought before the Lord Keeper of the Great Seal, and the Lord Treasurer, where the judgment was affirmed; and that upon this reason, for the proviso shall be taken to be a limitation to determine the estate, and not a condition to undo the estate, which cannot be defeated in case of a condition, but by entry.

Poph. R. 53.

1 I. R. 211 b.

§ 67. But where the proviso is, that upon nonpayment of the rent, &c. the lessor shall re-enter, there, if the lessor accepts rent, after the breach of the condition, he cannot afterwards take advantage of it, unless he was ignorant of such breach; in which case,
acceptance

Acceptance of rent will not bar him from entering and avoiding the lease.

§ 68. *John Pennant* made a lease for ten years, reserving rent, in which was a condition, that if the lessee aliened the lands without the assent of the lessor, it should be lawful for the lessor or his heirs to re-enter. The lessee aliened without licence, for which the lessor entered. The lessee said, that before the re-entry, the lessor accepted rent which became due after the alienation; to which, the lessor replied, that, before the receipt of the rent, he had no notice of the alienation.

Pennant's Case, 3 Rep. 64.

It was adjudged for the plaintiff.

§ 69. But where the lessor has notice of the breach of a condition, and afterwards accepts of rent, it will operate as a waiver of the forfeiture, and a confirmation of the lease.

§ 70. In a lease for twenty-one years, there was a covenant that the lessee should not underlet, assign, or transfer the premises, without the assent of the lessor; with a power of re-entry in case the lessee did not observe the covenants. The lessee underlet part of the premises, but with the knowledge of the lessor, who accepted rent accrued after such underletting.

Goodright v Davids, Cowp. 803.

Lord Mansfield.—"This case is extremely clear; to construe this acceptance of rent due since the condition

“ condition broken, a waiver of the forfeiture, is to
 “ construe it according to the intention of the parties.
 “ Upon the breach of the condition, the landlord
 “ had a right to enter; he had full notice of the
 “ breach, and does not take advantage of it, but
 “ accepts rent subsequently accrued; that shows he
 “ meant the lease should continue. Cases of for-
 “ feiture are not favoured in law; and where the for-
 “ feiture is once waived, the court will not assist it.

TITLE XXXII.

D E E D.

CHAP. VIII.

Of an Exchange, Partition, Release, and Confirmation.

- | | |
|---|--|
| § 1. <i>Of an Exchange.</i>
4. <i>Implies a Warranty.</i>
5. <i>Can only be between two Parties.</i>
7. <i>Who may Exchange.</i>
8. <i>Of a Partition.</i>
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13. <i>Operative Words.</i> | 15. <i>Different Kinds of Releases.</i>
16. <i>Mitter L' Estate.</i>
20. <i>Mitter Le Droit.</i>
22. <i>By Enlargement.</i>
36. <i>By Extinguishment.</i>
39. <i>What may be Released.</i>
42. <i>Of a Confirmation.</i> |
|---|--|

Section 1.

AN exchange is a mutual grant of equal interests, the one in consideration of the other. This mode of conveyance was formerly much in use, as appears from the many deeds of exchange which Mr. *Madox* has inserted in his *Formulare*.

Of an Exchange.

§ 2. Lord *Coke* says, there are five circumstances necessary to the validity of an exchange; 1st, The estates given must be equal in quantity of interest, though not in value; as fee simple, for fee simple; an estate for life, for an estate for life, &c. 2d, The word exchange, *excambium*, must be used, as it cannot be supplied by any other word, or by any circumlocution. 3d, There must be an execution of the exchange by entry or claim, in the lifetime of the parties,

parties, for by the exchange they have no freehold in deed or in law in them until it is executed by entry; and therefore if one of them dies before entry, the exchange is void: for the heir cannot enter and take it as a purchaser, because he is named only to take by way of limitation of estate in course of * descent. 4th, If the things exchanged lay in grant, it must have been by deed. And now by the statute 29 Cha. 2. c. 3. a writing is necessary, if the exchange is of freeholds, or of terms for years, being more than three years. 5th, If the lands exchanged lay in several counties there must have been a deed indented.

Lit. f. 62.

§ 3. An exchange is one of those conveyances to the completion of which livery of seisin is not necessary; for the entry of each upon the land acquired by the exchange is sufficient evidence of the alteration of possession.

Implies a
Warranty.
Bustard's
Case,
4 Rep. 121.

§ 4. It was resolved in 1 Jac. 1st, That in every exchange the word *excambium* implies in itself *tacite* a condition, and also a warranty, the one to give re-entry, and the other voucher and recompence, and all in respect of the reciprocal consideration, the one land being given in exchange for the other. But it is a special warranty; for upon the voucher by force of it, he shall not recover other land in value, but that only which was by him given in exchange. For inaf-

* If an exchange be made by lease and release, this inconvenience is prevented as the statute of uses executes the possession without entry, and all incidents annexed to an exchange at common law will be preserved.

much as the mutual consideration is the cause of the warranty, it shall therefore extend only to land reciprocally given, and not to other land; and this warranty runs only in privity, for none shall vouch by force of it, but the parties to the exchange, or their heirs, and no assignee.

2d, That if *A.* gives in exchange three acres to *B.* for other three acres, and afterwards one acre is evicted from *B.*, in that case, the whole exchange is defeated, and *B.* may enter into all his land: for, although the exchange had been good if *A.* had given but two acres, or but one acre, or less, yet, forasmuch as all the three acres were given in exchange for the others, and the condition which was implied in the exchange was entire, upon the eviction of one acre, the condition, in law, was broken, and therefore entry given into the whole.

3d, That as, when the whole estate in part was evicted the exchange was defeated; so, when an estate of freehold for life, which was but parcel of the estate, was evicted, the exchange was defeated.

§ 5. *Littleton* speaks of an exchange as of a transaction between two; and *Mr. Hargrave* observes, that, in a late case, it was held, that an exchange, in the strict legal sense of the word, could not be between three, the principle of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, first, the consideration of an exchange,

Can only be
between two
Parties,
1 Inst. 50 b.
n. 1.
3 Will. R.
489.

exchange, and the implied warranty incident to it, is the receiving something with warranty from the same person, to whom something with warranty is given; but if there could be three distinct parties, each would give to one, and receive from another. Secondly, the implied condition of re-entry is, that the re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title, as well as of his own.

1 Inst. 51 a.
n. 1.

§ 6. But although there cannot be more than two distinct parties to an exchange, yet there may be more than two persons. Thus, Lord *Coke* says, that an exchange between two joint-tenants and two tenants in common is good; for, although four persons are named, yet they constitute only two distinct parties: in point of interest, the two joint-tenants are the conveying parties on the one side, and the two tenants in common on the other; and, consequently, there is the same reciprocity, as if the transaction was between two persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only two distinct relative parties.

Who may
exchange.

1 Inst. 51 b.

§ 7. All persons capable of conveying away their lands, may, of course, exchange them for others; and if an infant exchanges lands, and enters on those acquired by the exchange, and continues to hold them after he attains his full age, the exchange is become perfect, for it was not originally void,

void, because the entry was equivalent to livery, and also in respect of the recompence, but only voidable.

§ 8. A partition is a deed by which two or more joint-tenants, coparceners, or tenants in common, divide the lands so held among them into separate and several parts, each taking a distinct part in severalty. Here, as in some instances, there is a unity of interest, and, in all, a unity of possession, it is necessary that they should all mutually convey and assure to each other, the several estates which they are to take in severalty under the partition.

Of a Partition.

§ 9. By the common law, coparceners being compellable to make partition, might have made it by parol only, but joint-tenants, and tenants in common, must have done it by deed; and, in both cases, the conveyances must have been perfected by livery of seisin. But the statute of frauds has now abolished this distinction, and made a deed equally necessary in all cases.

§ 10. Every partition implies, and has annexed to it, a warranty in law; and, in all modern deeds of partition, there are mutual covenants for the title.

Vide Tit. 19. f. 31.

§ 11. By the common law, where a man had the actual possession and right of property in lands, he could only convey them by feoffment, with livery of seisin; but, as it frequently happened, that the actual possession was in one person, and the right of possession or right of property in another, in case the person who had the right of possession or right of property was willing to convey those rights

Of a Release, Gilb. Ter. 53.

rights to the person who had the actual possession, it was done by a discharge of his right to the person in possession; which species of conveyance acquired the name of a release. A feoffment would, in such a case, have been useless, because it could not transfer the possession, as the person was in possession already,

Gilb. Ten. 53. § 12. A release is, therefore, a conveyance of a right, to a person in possession. Thus, where a man was disseised, the disseisor acquired the possession, and the right of possession and property remained in the disseisee. Now, if the disseisee agreed to transfer his rights to the disseisor, the proper mode of carrying such an agreement into execution was, by a release; for the disseisor being already in possession, it would have been useless to have made him a feoffment.

Operative Words. § 13. The operative words of a release are, *remisisse* 1 Inst. 264 b. *relaxasse et quietum clamasse*: remise, release, and for ever quit claim. Besides which, there are other words, such as *renuntiare*, *acquietare*. And, where a lessor granted to a lessee for life, that he should be discharged of the rent, this was held to amount to a release.

Lit. f. 508. § 14. Littleton says, that a release of all demands is the best and strongest release: and Lord Coke observes, that the word demand is the strongest word in the law, except the word claim; and that a release of all demands discharges all sorts of actions, rights, and titles, conditions, before and after breach, executions, appeals, rents of all kinds, covenants, contracts, recognizances, statutes, &c.

§ 15. Releases of land, in respect to their operation, are divided into four sorts. 1st, Releases that enure by way of *mitter L'Estate*. 2d, Releases that enure by way of *mitter Le Droit*. 3d, Releases that enure by enlargement. And, 4th, Releases that enure by extinguishment.

Different
Kinds of
Releases.
1 Inst. 193 b.
273 b.

§ 16. When two or more persons become seised of the same estate by a joint title, either by contract or descent, as joint-tenants, or coparceners, and one of them releases his right to the other, such release is said to enure by way of *mitter L'Estate*. For where two several persons come in by the same feudal contract, one of them may discharge to the other the benefit of such contract, by a release; because no notoriety is needful, for there was a sufficient notoriety in the prior feudal contract. Thus, two coparceners come into one entire feud, descending from their ancestor, and, therefore, they may release privately to each other, because they take by the former descent, which established them in possession, without any notoriety. But since coparceners do also transmit distinct estates to their children, they may also pass their estates by distinct feoffments.

*Mitter
L'Estate.*

Lit. f. 304.
1 Inst. 273 b.
Gilb. Ten. 72.

Tit. 19.

§ 17. As to joint-tenants, they can only pass their estates to one another by release, for they all come in by the first feudal contract; and, therefore, a second feoffment cannot give any farther title or notoriety, because every person is supposed to be in by his elder title, which, in the case of joint-tenants, is the ori-

Idem.

Tit. 18. ch. 2.
f. 20.

ginal feoffment, so that a second feoffment would be useless.

1 Infl. 273 b.

§ 18. In consequence of this privity, which must necessarily exist in releases that enure by way of *mitter L'Estate*, a fee will pass by such a release without any words of limitation; for the parties are not in by the release, but by the original feudal contract, which passed an inheritance, and the release only discharges the pretensions of one of them; so that, where one joint-tenant or coparcener releases to the other, the releasee is in by the original conveyance, and such release is not considered as an alienation, nor does it make a degree.

Tit. 20.

§ 19. One tenant in common cannot release to his companion, because they have distinct freeholds, but they must pass their estates by feoffment and livery of seisin; for, as they were created by different acts, and different liveries, they must also pass to each other by distinct liveries.

Mitter Le Droit.

Lit. f. 466.

Gilb. Ten. 55.

§ 20. Releases are said to enure by way of *mitter Le Droit*, where a person who has been disseised releases to the disseisor, or to the heir or feoffee of the disseisor, who, being in possession, is therefore capable of taking a release of the right. And as, in cases of this kind, nothing but the bare right passes, the release is said to enure by way of *mitter le Droit*.

Lit. f. 467.

§ 21. No words of limitation are necessary in a release that enures by way of *mitter le droit*; for if a
release

release of right be made to a person seised in fee, for a day, or an hour, it will be as strong as if it were made to the releasee and his heirs for ever.

§ 22. Releases enure by way of enlargement of estate, when the possession and inheritance are separated for a particular time; and he who has the reversion and inheritance, releases all his right and interest in the lands to the person who has the particular estate: such releases are said to enure by way of enlargement, and to amount to a grant and attornment, because they transfer the legal estate as effectually to the releasee, as a feoffment with livery.

By Enlarge-
ment.
Lit. f. 465.
1 Inst. 272 b.

§ 23. To render this conveyance effectual, it is necessary that there should be a privity of estate between the releasor and releasee; and also, that the releasee should have such an estate as is capable of being enlarged.

§ 24. With respect to privity of estate, if a person makes a lease for years, the lessee is, of course, capable of taking a release from the lessor, because there is a privity between them.

1 Inst. 273 a

§ 25. If *A.* makes a lease to *B.* for life, and the lessee makes a lease for years, and, afterwards, *A.* releases to the lessee for years, it will not enlarge his estate, because there is no privity between *A.* and the lessee for years. So, if a person makes a lease for 20 years, and the lessee makes a lease for 10 years, if the first

Idem.

lessor releases to the second lessee, his release will be void for want of privity.

Lit. f. 460. 1.
1 Inst. 270 b.

§ 26. A release to a tenant at will operates so as to enlarge his estate, because there is a privity between him and the lessor. But a release to a tenant at sufferance is void, for want of privity.

1 Inst. 270 a.
m. 3.

§ 27. Lord *Coke* says, that a release which enures by way of enlargement, cannot work without a possession. But this must be understood to mean, not that an actual estate in possession is necessary, but that the releasee has an estate actually vested in him, at the time of the release, which is capable of being enlarged by such release.

Idem.

§ 28. Thus, Lord *Coke* says, if a tenant for 20 years in possession make a lease to *B.* for five years, and *B.* enters, a release to the first lessee is good, for he had an actual possession, and the possession of his lessee is his possession : and so it is, if a man makes a lease for years, the remainder for years, and the first lessee doth enter, a release to him in remainder for years is good to enlarge his estate.

1 Inst. 270 b.

§ 29. Lord *Coke* also says, if a man make a lease for life, remainder for life, and the first lessee dies, a release to him in the remainder is good, before he enters, to enlarge his estate ; for that he has an estate of freehold in law in him, which may be enlarged by release, before entry.

§ 30. It

§ 30. It should, however, be observed, that if a person makes a lease for years, and the lessor releases all his right to the lessee, before entry, such release is void, and will not enlarge his estate; for the lessee, before entry, had neither a possession, nor a vested estate, but only an *interesse termini*. Lit. f. 459.
1 Inst. 270 a.
Tit. 8. ch. 1.
f. 14.

§ 31. A release to a *cestui que use* by the feoffees to uses, was held by *Littleton* to be sufficient to enlarge his estate; because the *cestui que use* was tenant at will to the feoffees, and there was a privity between them. From which, it may be concluded, that a release to a *cestui que* trust by the trustee, would now operate to enlarge his estate. Lit. f. 462,
3, 4.
1 Inst. 271 a.

§ 32. A release to a tenant by statute merchant, statute staple, or eligit, will operate to enlarge the estate. 1 Inst. 270 b.

§ 33. Lord *Coke* says, if a feme covert be tenant for life, a release to the husband will be good; for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement: for, by the intermarriage, the husband acquired a freehold in his wife's right. 1 Inst. 273 b.

§ 34. Releases which operate by way of enlargement, require the same technical words of limitation as feoffments or grants: for, if a lessor releases to his lessee for years all his right in the lands, this will only pass an estate for life. Lit. f. 465.

1 Inst. 273 b.

§ 35. Lord *Coke*, however, says, that if a man makes a lease to *A.* for term of the life of *B.*, and afterwards releases to *A.* all his right in the land, *A.* will take an estate for his own life : because an estate for a man's own life is higher, in judgment of law, than an estate for the life of another.

Extinguishment.

Lit. f. 479,

480.

1 Inst. 280 a.

§ 36. In some cases, where the release cannot enure by way of *mitter le Droit*, it will operate by way of extinguishment. Thus, if a lord releases his seignory to the tenant, or if the grantee of a rent or common, releases it to the terre-tenant, these releases are said to operate by way of extinguishment of the services, the rent, or the common ; because the tenant cannot have services or rent to receive of himself ; nor can he take common in his own land.

1 Inst. 270 a.

§ 37. If a man makes a lease for years to begin presently, reserving rent, and, before the lessee enters, the lessor releases all his right in the land, although this cannot enure to enlarge his estate, yet it shall operate to extinguish the rent.

Ante f. 30.

S. 470.

§ 38. *Littleton* says, if a tenant for life lets the land over to another for term of the life of the lessee, remainder to another in fee, and the lessor releases to the person to whom the tenant made the lease, the lessor will be thereby for ever barred, although no mention is made of his heirs : for, at the time of the release made, the lessor had no reversion, but only a right to have the reversion. And Lord *Coke*, in his comment on this passage, observes, that the release to the lessee does

does not enure by way of *mitter le Droit*, for then should he have the whole right, but by way of extinguishment, in respect of him that made the release, and that it shall enure to him in remainder.

§ 39. With respect to the things that may be released, it is a rule of law, that no possibility, right, title, or thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits.

What may be Released.
Lampet's Case,
10 Rep. 46.

§ 40. Hence it is said by *Littleton*, that a son cannot release to his father's disseisor, in the lifetime of the father, because he has no right to the land during the life of his father; and, therefore, in such a case, the son may enter on the land, against his own release.

l. 446.

1 Inst 265 a.

§ 41. But although a mere possibility cannot be released to a stranger, yet all rights, titles, and actions, may be released to the terre-tenant, for securing his repose and quiet, and for avoiding contentions and suits; and, therefore, a right or title to an estate of freehold, be it *in presenti* or *futuro*, may be released in five manners. 1st, To the tenant of the freehold in fact or in law, without any privity. 2d, To the person in remainder. 3d, To the person who is seised of the reversion, without any privity. 4th, To the person who has right only in respect of privity; as, if the tenant be disseised, the lord may release his services, in respect of the privity and right, without any estate. 5th, In respect of privity only, without right,

10 Rep. 48 a.

as if tenant in tail makes a feoffment in fee, the donee, after the feoffment, has no right, and yet, in respect of the privity only, the donor may release to him the rent and all services, saving fealty.

Of a Confirmation.
11 ft. 295 b.
Gilb. Ten 75.

§ 42. A confirmation is of a nature nearly allied to a release. Lord Coke defines it to be, “ a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased.”

Sec. 520.

§ 43. The proper technical words of a confirmation are, ratify, approve, and confirm : and Littleton says, that *confirmare idem est quod firmum facere*.

Sec. 531.

§ 44. The words *dedi et concessi* have the same effect in some cases as the word *confirmare*. Thus, if a disseisee conveys to the disseisor by the word *dedi*, or *concessi*, it will operate as a confirmation.

§ 45. The first part of the definition of a confirmation, may be illustrated by the following case : Where a tenant for life makes a lease for 20 years, and dies during the term, if the reversioner confirms the lease during the life of the tenant for years, it will be no longer voidable.

1 Inst. 296 a,

§ 46. As to the latter branch of the definition, whenever a confirmation operates by way of increasing the estate, it is similar in all respects to that kind of release which operates by way of enlargement, for there must be a privity of estate, and proper words of limitation.

§ 47. In

§ 47. In the case of a disseisin, a confirmation by the disseisee to the disseisor, of his estate, will give him a fee-simple, without the word heirs. And it would be the same, if the estate of the disseisee had been confirmed for a day or an hour only. But if a disseisor makes a lease for 100 years, the disseisee may confirm parcel of these years by apt words, without confirming the whole. Lit. f. 519, 20. 1 Inst. 297 a.

§ 48. Mr. *Butler* has observed upon this passage, Id. n. 1. that the distinctions taken here by Lord *Coke* are, that a confirmation of a tenant of freehold or inheritance cannot be so worded as to have a less operation than that of confirming his whole estate: consequently, a confirmation to such a tenant, either of the lands or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee-simple; a confirmation, therefore, to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term of years; a confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold, or of inheritance, is considered as integral and indivisible. But as years are several, the term which is composed of them, is necessarily fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms the *estate* of the tenant for years for part of the term, as the word *estate* signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to

to them ; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary.

Sect. 524.

§ 49. *Littleton* says, if a man lets land to another for life, and after confirms his estate which he hath in the same land, to hold his estate to him and his heirs, this confirmation to his heirs is void, for his heirs cannot have his estate, which was but for term of his life. But if he confirms his estate by these words, to have the same land to him and his heirs, this confirmation will give him an estate in fee-simple ; because it applies to the land, and not to the estate in the land.

3 Inst. 295 b.

§ 50. Lord *Coke* says, that a confirmation doth not strengthen a void estate ; *confirmatio est nulla, ubi donum præcedens est invalidum, et ubi donatio nulla omnino, nec valebit confirmatio* : for a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law,

TITLE XXXII.

D E E D.

CHAP. IX.

Of a Surrender, Assignment, and Defeazance.

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| § 1. <i>Of a Surrender.</i>
3. <i>No technical Words necessary.</i>
4. <i>Not Livery of Seisin.</i>
5. <i>Must be in Writing.</i>
8. <i>What Estate necessary.</i> | § 15. <i>Of an Assignment.</i>
18. <i>No technical Words necessary.</i>
20. <i>Must be by Deed.</i>
21. <i>What may be assigned.</i>
24. <i>Of a Defeazance.</i> |
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Section 1.

A SURRENDER, *fursum redditio*, is of a nature directly opposite to a release; for, as that operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater by deed. Of a Surrender.

Lord *Coke* defines it to be, a yielding up of an estate for life or years, to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown, by mutual agreement between them. 1 Inst. 337 b.

§ 2. It has been held, after great consideration, that a surrender immediately divests the estate out of the surrenderors, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which, Thompson v. Leach,
2 Salk. 618.

which, no other act but the bare grant is necessary; and, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied. A gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed: and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property; or sealing a bond to another in his absence, should be the obligee's bond immediately, without notice.

No technical
Words necessary.

Perk. f. 607.

2 Roll Ab.
497.

§ 3. The technical and proper words of a surrender are, surrender and yield up. But any form of words by which the intention of the parties is sufficiently manifested, will operate as a surrender. Thus, if a lessee for years remise, release, discharge, and for ever quit claim his lessor all his right, title, or interest, in or to such lands, it will amount to a surrender. So, if a lessee for life leases to the lessor for the life of the lessee, this is a surrender.

Nor Livery
of Seisin.

§ 4. In a surrender, there is no occasion for livery of seisin, because there is a privity of estate between the surrenderor and surrenderee; for the particular estate of the one, and the remainder of the other, are, in fact, one and the same estate; and livery having been once made at the creation of it, there can be no necessity for a second livery.

Must be in
Writing.

§ 5. By the statute 29 Cha. 2. c. 3. it is enacted, that no lease, estate, or interest of freehold, or term of years, or any uncertain interest, not being copyhold,

hold, shall be surrendered, unless by deed or note in writing, signed by the parties surrendering the same, or his agent thereunto lawfully authorized, in writing.

§ 6. It was held by Lord Chief Baron *Gilbert*, that upon the true construction of this statute, a lease for years cannot be surrendered by cancelling the indenture. Because the intent of the statute was, to take away the manner they formerly had of transferring interests in lands, by signs, symbols, and words only; and therefore as livery of seisin on a parol feoffment was a sign of passing the freehold, before the statute, but is now taken away by the statute, so the cancelling of a lease was a sign of a surrender, before the statute, but is now taken away, unless there be a writing under the hand of the party. And the words, by act and operation of law, are to be construed a surrender in law, by the taking a new lease, which being in writing, is of equal notoriety with a surrender in writing.

Magenis v. Macullock,
Gillb. R. 236.

§ 7. It was held in a modern case, that the statute of frauds does not make a deed absolutely necessary to a surrender; but that a note in writing will have the same effect.

Farmer v. Rogers,
2 Will. R. 27.
Smith v. Mapleback,
1 Term R. 441.

§ 8. To make a surrender good, the person who surrenders must be in possession, and the person to whom the surrender is made, must have a greater estate immediately in remainder or reversion, in which the

What Estate necessary.

Perk. l. 589. the estate surrendered may merge. A tenant for life cannot therefore surrender to a tenant for years.

Hughes v.
Robotham,
Cro.Eliz. 302.
Poph. 31.
Bac. Ab. Tit.
Lease (S. 2.)

§ 9. It was formerly doubted whether a lessee for years could surrender to a person who had the reversion only for years; but this point appears to have been settled by a determination in 35 *Eliz.*, in which it was laid down, 1st, That if the term in reversion be greater than the term in possession, the greater will merge in the less; as ten years may be surrendered and merge in twelve or fourteen years. 2d, That though the reversion be for a less number of years, yet the surrender will be good, and the first term merged. As if one were lessee for twenty years, and the reversion expectant thereon was granted to another for a year, who granted it over to the lessee for twenty years, that this would operate as a surrender of the twenty years term, as if he had taken a new lease from his lessor for one year; for the reversionary interest coming to the possession, drowns it, and the number of years is not material, for as he may surrender to him who hath the reversion in fee, so he may to him who hath the reversion for any less term. And therefore *Popham* held, that where lessee for twenty years, makes a lease for ten years, and the lessee for ten years surrenders to his lessor, viz. the lessee for twenty years, that this is good; and the lessor shall have so many of the years as were then to come of his former term of twenty years, that is, as it seems, so many years as were to come of his reversion, shall now be changed into possession. And he held

held further, that if such lessee for twenty years had made such lease for ten years, and then granted over the reversion for ten years only, *viz.* no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the rent and services; and the grantor the residue of the twenty years. And that the lessee for ten years might surrender to the grantee of the reversion for ten years; and he thereby would have in possession, so many years as were then to come of his reversion. And if he had a less term in the reversion, than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession was quite gone and drowned in the reversion, to the benefit of those who had the reversion thereupon, having regard to their estate in reversion, and not otherwise.

§ 10. An estate at will is not surrenderable, because it is at the will of both parties, and either party may determine his will without the formality of a surrender; and therefore there is no surrender in law of an estate at will, between common persons. 12 Mod. 79.

§ 11. A surrender can only be made by a person who is in possession; and therefore if a lessee for life or years, be ousted by a stranger, and afterwards surrenders to his lessor, it will be void; because he had but a right at the time of the surrender. Perk. f. 599, 600.

§ 12. So

Idem.

§ 12. So if a woman has a title to dower, and she surrenders to the person against whom she ought to have dower, it is a void surrender.

Perk. f. 601.

§ 13. In consequence of this principle, a lease for years, to commence at a future day, cannot be surrendered before it commences; for there is nothing in the lessee, in possession, before the commencement. Nor has the lessor a reversion before that time, but is possessed of the land in demesne.

§ 41.

§ 14. To make a surrender good, there must be a privity of estate between the surrenderor and the surrenderee. Thus it is said in *Plowden*, that if a tenant for thirty years makes a lease for ten years, and the lessor and lessee join in a surrender to the person in reversion in fee, the surrender is good for both the estates; and yet the lessee for ten years, could not surrender by himself, for want of privity; but when the other joined with him, his surrender shall be taken in law to precede, and the surrender of the lessee for twenty years to follow, so that the same shall be good.

Of an Assignment.

§ 15. An assignment is properly a transfer or making over to another, of the interest or estate which the assignor has in lands or tenements. But it is usually applied to the transfer of a term for years. And it differs from a lease only in this circumstance, that by a lease, the lessor conveys an interest less than his own, reserving to himself a reversion. Whereas
in

in an assignment, the assignor parts with his whole interest and property in the thing assigned, and puts the assignee in his place.

§ 16. Where a person conveys away all his term, but reserves rent to himself, this is not an assignment.

§ 17. *A.* having a term for years, whereof one year and three quarters was to come, agreed with *B.* that he should have the premises for the remainder of the term, paying the same rent to *A.* as was reserved upon the original lease. It was held that this was an underlease, and not an assignment.

Poulteney v. Holmes, Stra. R. 405.

§ 18. The proper and technical words of an assignment are—assign, transfer, and set over; but the words give, grant, bargain, and sell, or any other words which shew the intention of the parties to make a complete transfer, will amount to an assignment.

No technical Words necessary.

§ 19. There needs no consideration to support an assignment by a tenant for years, for the tenure and attendance, and the being subject to forfeiture, as also the payment of rent, if there is any, is sufficient to vest the term in the assignee.

1 Mod. 263.

§ 20. Previous to the statute of frauds and perjuries, all chattels real might have been assigned without deed. But it is enacted by that statute, that no leases, estates, or interest, either of freehold, or term for years, or any uncertain interest in lands, shall be

Must be by Deed.

assigned, unless by deed or note in writing, signed by the party or his agent, lawfully authorized by writing.

What may be assigned.

§ 21. Every estate and interest in lands and tenements, may be assigned, as also every present and certain estate or interest, in incorporeal hereditaments, such as rents, advowsons, &c. and even though the interest be future, as a term for years, to commence at a subsequent period, it may be assigned; for the interest is vested *in presenti*, though it is only to take effect *in futuro*.

Perk f. 91.

§ 22. It should however be observed, that no right of entry or re-entry can be assigned, so that if a person be disseised, and assigns over his right to another, before he has entered on the disseisor, such assignment is void. Lord Coke says, that this doctrine is founded on a principle of the common law, that nothing in action, entry or re-entry, can be granted over; for so under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed.

Lit. f. 347.

1 Inst. 214 a.

1 Inst. 232 b.
n. 2.

§ 23. In modern times, however, property only recoverable by suit at law, is constantly assigned, though in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore when a debt or bond is said to be assigned, it must still be

be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee, and our courts of equity, considering that in a commercial country much property must lie in contract, will protect the assignment of a chose in action, as much as the law will that of a chose in possession.

§ 24. A defeazance is a collateral deed, made at the same time with a feoffment or grant, containing certain conditions, upon the performance of which, the estate created by such feoffment or grant, may be defeated. The word is derived from the *French*, *defaire*, to defeat or undo, *infectum reddere quod factum est*. A defeazance executed at the same time with a feoffment, was considered as a part of it, and therefore allowed; but no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, was formerly permitted.

Of a Defeazance.
Shep. T. 395.

1 Inst. 236 b.

§ 25. As to things that were merely executory, or to be completed by matter subsequent, as rents, conditions, warranties, &c. they were always liable to be defeated by defeazances made subsequent to the time of their creation.

1 Inst. 237 a.

§ 26. The difference between a defeazance and a condition is, that a condition is inserted in the deed by which the estate is created, and a defeazance is a separate deed, executed at the same time with the original deed.

§ 27. A defeazance must be made *in eodum modo*, and by matter as high as the thing to be defeated. So that if the one be by deed the other must be so also. And where the defeazance recites the deed, which it is meant to defeat (as it always does) it must recite it truly.

TITLE XXXII.

D E E D.

CHAP. X.

Of a Bond and Recognizance.§ 1. *Of a Bond.*11. *Effect of a Bond as to the Obligor.*12. *As to his Heir.*15. *Statute of Fraudulent Devises.*§ 17. *Where the Remedy may exceed the Penalty.*19. *Assignable.*20. *Of a Recognizance.*

Section 1.

A BOND or obligation is a deed, whereby the obligor binds or obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to the obligee, at a particular day. If this be all, the bond is called a simple one, *simplex obligatio*. But there is generally a condition added, that if the obligor does some act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest; which principal sum is usually one half of the penal sum specified in the bond. Of a Bond.

§ 2. There are only three things essentially necessary to the making of a bond or obligation, 1st, Writing on paper or parchment. 2d, Sealing; and, 3d, Delivery. For as to signing, that circumstance was

2 Salk. 462. clearly not necessary in former times, and the statute of frauds does not seem to extend to the case of a bond.

Cro. Eliz.
56. 729.
886.

§ 3. The law does not require any particular form of words as essentially necessary to constitute a bond, but any words which shew the intention of the party to bind himself will be sufficient, for such obligation is only in the nature of a contract, or a security for the performance of a contract, which is construed according to the intention of the parties.

Cro. Jac. 203.
208.

§ 4. It has been held in a variety of cases, that a seeming *Latin* word, not properly expressing the *quantum* of the sum in which the party intended to be bound, should, notwithstanding, be so construed as to answer the intention of the parties, rather than the obligation should be void.

Cromwell v.
Grumden,
1 Ld. Ray.
335.

Cro. Ja. 607.

§ 5. It is the same, if there be an evident mistake in the *English* word expressing the sum intended. Thus a bond for *threty* pounds, was held to be good for *thirty* pounds.

Butler v.
Wigge,
1 Saund. 66.

§ 6. Any words by which the intention of the parties can be discovered, are sufficient to make a condition of a bond: for if the words, though improper, should be construed void, and not a condition, then the obligation would be single, and of force against the obligor, although he had performed the condition of it according to the intention of the parties: and the

the condition being for the benefit of the obligor, shall be construed favourably.

§ 7. Mr. Serjeant *Williams*, in his notes on this case, says—" With respect to impossible or void conditions, " the following distinction has been taken ; that where " the condition is underwritten or indorsed, that is " only void, and the obligation is single ; but where " the condition is part of the lien itself, and incorporated therewith, (as in a recognizance by bail) " if the condition be impossible, the obligation is " void." Pullerton v. Agnus, 1 Salk. 172

§ 8. If there be an omission of the usual conclusion of a condition, namely, that then the obligation shall be void, &c. yet the condition is good, and it is a good defeazance of the bond, for insensible and repugnant words shall be rejected. Idem.

§ 9. Where the condition of a bond is entire, and the whole is against law, it is void. But where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. But if a bond is given, with condition to do a thing against an act of parliament, and also to pay a just debt, the whole bond is void, because the letter of the statute makes it void, and it is a strict law. Idem. Hob. 14

§ 10. This security is called a specialty, the debt being therein particularly specified, in writing ; and the party's seal, acknowledging the debt or duty, and

confirming the contract, renders it a security of a higher nature than those entered into without the solemnity of a seal. And therefore bond debts are preferred to those due upon simple contract.

Effect of a
Bond as to
the Obligor.

§ 11. When the condition of a bond is not performed, it becomes forfeited, or absolute at law; and is a charge on the personal estate and chattels real of the obligor, but not on his freehold lands; and therefore any settlement or disposition which he makes in his lifetime, of his lands, whether voluntary or not, will be good against bond creditors. For a bond being no lien whatever, on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger.

Parflow v.
Weedon,
1 Ab. Eq.
149.

As to his
Heir,
Tit. 1. f. 63.

§ 12. But if the obligor binds himself and his heirs in a bond, it will then be a lien on his heir, who in default of personal assets, will be bound to discharge it out of the real assets of the obligor, provided real assets descend to the heir; so that a bond is a collateral, though not a direct charge on lands.

Tit. 17. f. 17,
to f. 20.

§ 13. It has been stated in a former title, that reversions after estates for years are immediate assets, and reversions after estates for life are *quasi assets*, in both of which cases they are liable to the payment of bond debts.

Tit. 17. f. 23.
29.

§ 14. It has also been stated, that reversions expectant on estates tail, are assets when they fall into possession; and in such case they are liable to the bond debts

debts of the person who was the original donor of the reversion, and to whom the person claiming such reversion must make himself heir, but not to the bond debts of any of the intermediate heirs, who were entitled to such reversion.

§ 15. By the statute 3 *Will. and Mary*, c. 14. s. 2, and 3, all devises of lands are declared to be fraudulent and void, as against bond creditors, who may sue the heirs of the obligor, and also his devisees jointly. And, it has been determined by Lord *Hardwicke*, that an estate in reversion is within this statute. And that a devise of the reversion by the heir of the obligor, is also within the act, and in such a case the lands devised are liable.

Statute of
Fraudulent
Devises.

Vide *Kinaston v. Clarke*,
Tit. 17. s. 26.
Tit. 38. c. 1.

§ 16. By the fifth section of this statute, it is enacted, that where the heir alienates the estate before any action brought, he shall be answerable for the bond debts of his ancestor. But if the heir alienates the land, the obligee of the bond by which the heir is bound, can have his remedy only against the person of the heir, to the amount of the value of the land: but he cannot follow the land, when it is in the possession of a *bona fide* purchaser.

Vide Tit. 1.
s. 64.

Bull. N. P.
175.

§ 17. Where a bond was forfeited, the penalty, which is usually double the sum advanced, became the legal debt; and there was no relief against such penalty, but by application to a court of equity, where the obligee was only allowed to recover his principal, interest, and costs.

Where the
Remedy may
exceed the
Penalty.

§ 18. Although

2 Term Rep.
388.

§ 18. Although at law there can, in general, be no remedy beyond the penalty, because in that the obligee seems to have taken up his security; yet as it is on the foundation of doing equal justice to both parties that equity proceeds, it will on any application for a favour from the obligor, compel him to pay the principal, interest, and costs, though exceeding the penalty.

Vide 3 Bro.
R. 492. 525.

Assignable.

1 Ab. Eq. 44.

2 Vern. 428.

§ 19. It has been stated, that choses in action are assignable in equity, so that bonds are assignable. But the assignee takes them subject to the same equity to which they were liable in the hands of the original obligees.

Of a Recognizance.

§ 20. A recognizance is an obligation of record, which a person enters into before some magistrate, duly authorized, or in a court of record, to do some particular act, as to appear at the next assizes, to keep the peace, to pay a sum of money, or the like. It is in most respects similar to a bond, the difference being chiefly, that a bond is the creation of a new debt, or obligation: whereas a recognizance is the acknowledgment upon record of a former debt.

§ 21. The form of a recognizance is thus, “ That
“ *A. B.* doth acknowledge to owe to our sovereign lord
“ the king, or to *C. D.* the sum of 100 *l.* with condition
“ to be void on performance of the thing stipulated.”
This being either certified to, or taken by the officer of some court, it is witnessed only by the officer of that court, and not by the party’s seal, so that it is not,
in

in strict propriety, a deed, though the effects of it are greater than those of a common bond, being allowed a priority in point of payment.

§ 22. A recognizance is a lien upon all the lands which the cognizor has at the time he acknowledges it, and also upon all those which he afterwards acquires; so that no alienation by the cognizor will prevent the cognizee from extending the land.

§ 23. Where a reversion expectant on an estate tail falls into possession, it then becomes liable to the recognizances, not only of the original donor, but also of all the intermediate heirs who were entitled to such reversion, because it is a direct lien on lands, and differs in that respect from a bond.

Vide Tit. 19
l. 31, 32.

§ 24. By the statute 29 Cha. 2. c. 3. it is enacted, that no recognizance shall bind lands in the hands of *bona fide purchasers*, but from the time of the inrollment.

8 Geo. 1.
c. 25.

§ 25. There are two other kinds of recognizances, of a private sort, which are said to be in the nature of a statute merchant and statute staple, which have been already explained.

Vide Tit. 14.

TITLE XXXII.

D E E D.

CHAP. XI.

Of a Bargain and Sale.

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| <p>§ 1. <i>Conveyances derived from the Statute of Uses.</i>
 3. <i>Of a Bargain and Sale.</i>
 4. <i>What Words necessary.</i>
 9. <i>Who may convey by Bargain and Sale.</i></p> | <p>§ 15. <i>What may be conveyed by.</i>
 22. <i>What Consideration necessary.</i>
 26. <i>Must be inrolled.</i>
 34. <i>Exception—Lands in Cities and Boroughs.</i>
 37. <i>Relation of the Inrolment.</i></p> |
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Section 1.

Conveyances
derived from
the Statute of
Uses.

HAVING treated of the several kinds of deeds which derive their effect from the common law, we now come to explain the nature and effect of those deeds which derive their effect from the statute of uses.

Tit. 11. ch. 4.
s. 10.

§ Rep. 94 a.

§ 2. It has been stated in a former title, that the statute of uses has given rise to several new sorts of conveyances which operate contrary to the rules of the common law. The first of these, which operates without any transmutation of possession, is a bargain and sale to uses, which was well known, and often used before the statute of uses; it being a common practice in those times, for a person who was seised of lands, to bargain and sell them to another; in which case, if the consideration was sufficient to raise a use, the

the bargainor became immediately seised to the use of the bargainee: all which might have been transacted without the formality of a deed.

§ 3. A bargain and sale to uses, is a contract by which a person conveys his lands to another for a pecuniary consideration; in consequence of which, a use arises to the bargainee, and the statute 27 Hen. 8. immediately transfers the legal estate and possession to the bargainee, without any entry or other act on his part.

Of a Bargain and Sale.
2 Inst. 671.

§ 4. The proper and technical words of this conveyance are, bargain and sell; but any other words that would have been sufficient to raise a use, upon a valuable consideration, before the statute, are now sufficient to constitute a good bargain and sale, but proper words of limitation must be inserted.

What Words necessary.
2 Inst. 671.

§ 5. Thus, if a man, for money, aliens and grants lands to one and his heirs, or in tail, or for life, by deed indented and inrolled, it will amount to a bargain and sale, and the land will pass without any livery of seisin.

8 Rep. 94.

§ 6. So, where a man covenants, in consideration of money, to stand seised to the use of his son in fee; if the deed be inrolled, it is a good bargain and sale, though the words, bargain and sell, be not used.

Idem.

§ 7. *Edward Fox* demised lands to *G. Smalman* and others, for three lives, reserving rent; and, afterwards, by

Fox v. Smalman,
8 Rep. 93.

by indenture, in consideration of 50 l. paid him by *Thomas Powys*, he demised, granted, set, and to farm let to the said *Thomas Powys*, the said tenements, to hold to the said *Powys* for the term of 99 years, reserving rent, and the first lessee did not attorn. The question was, whether the demise to *Powys* should amount to a bargain and sale, so that the reversion with the rent should pass to *Powys* by the statute of uses without any attornment. And it was adjudged, that this demise and grant, in consideration of 50 l., amounted to a bargain and sale for 99 years, there being no necessity for the precise words bargain and sell. And it was said, that as uses arise from the intention of the parties, if by any clause in a deed it appears that it was the intent of the parties to pass it in possession by the common law, there no use shall be raised; and, therefore, if any letter of attorney be in the deed or covenant, to make livery of the lands according to the form and effect of the deed, or other such like, it shall not pass by way of use.

Anon. 3 Leon.
16.

§ 8. Where a deed contained a power of attorney to make livery of seisin, but was inrolled as a bargain and sale, within a month after its execution, though livery of seisin was given four months after, yet it was held to operate as a bargain and sale, and not as a feoffment.

Who may
convey by
Bargain and
Sale.

§ 9. With respect to the persons who are capable of conveying their estates by bargain and sale, as this conveyance only transfers a use, none but those who are capable of being seised to a use can bargain and sell:

sell: for there must be a person seised to a use, and a use *in esse*, before the statute can have any operation. Tit. 11. ch. 3.

§ 10. It follows, that neither the king, the queen, nor a corporation aggregate, can convey their lands by bargain and sale: but, as all private persons may be seised to a use, they may convey their estates by bargain and sale. Atkins v. Longvill, Cro. Ja. 50.

§ 11. *Jenkins* says, that a bargain and sale by the king for any consideration, to a corporation, is good, although the king cannot stand seised to the use of another; and the consideration of money paid, or mentioned to be paid, although by any stranger, will make the bargain and sale valid. Cent. 6. ca. 88.

§ 12. Lord Chief Baron *Comyns* has said, that a corporation may bargain and sell, for they may give a use, though they cannot be seised to a use. This position is founded on the authority of the following case. Dig. Tit. Barg. & Sale, (B. 3.)

§ 13. The Priores of *Hallywell* being seised of *Priors*, granted the same by the words *dedi et concessi pro certa pecunie summa*, to Lord *Audley* the chancellor of *England*, and his heirs. It was objected, that a bargain and sale by a corporation was not good, for a corporation could not be seised to another's use; and the nature of such a conveyance was, to take effect by way of use, in the bargainee, and, afterwards, the statute drew the possession to the use. But the court utterly

utterly rejected the said exception, as dangerous, for that such were the conveyances of the greater part of the possessions of monasteries. And it was said by Serjeant *Shuttleworth*, that although such a corporation could not take an estate to another's use, yet they might charge their own possessions with a use to another.

§ 14. This case appears to be of doubtful authority, for the only principle upon which it can be supported, namely, that lands may be charged with a use, was utterly rejected in *Chudleigh's* case; in which, it was held, that a use being a confidence and trust, it would be an absurdity to say that it was annexed to the land, or charged on the land, like a rent or common.

What may be conveyed by.

§ 15. Every estate of freehold or inheritance in possession in land, may be conveyed by bargain and sale. But it was formerly held, that there must be an actual seisin in the bargainor, at the time when the bargain and sale was made, for, without a seisin, no use could arise.

Ante f. 7.

Idem.

§ 16. An actual seisin in the bargainor, in order to enable him to convey by bargain and sale, does not, however, seem to be required in many cases. Thus, it was held in *Fox's* case, that a reversion expectant on a freehold estate might be conveyed by bargain and sale. And it appears to be now admitted, that estates in remainder and reversion may be conveyed by bargain and sale, provided the right to them be actually vested in the bargainor at the time of the execution of

of the bargain and sale. And Lord *Hardwicke* is reported to have said, that an equity of redemption may be conveyed by bargain and sale. 2 Atk. 15.

§ 17. A trust estate is now frequently conveyed by bargain and sale, and Lord *Thurlow* is reported to have said, that, in many acts of parliament, an equitable estate is considered the same as if it were a legal estate; that the word *seised*, in law or equity, in the qualification act, shew that the word *seised* is applicable to both, and that the word *seisin* extends to being *seised* of an estate in equity. *Shrapnel v. Vernon*, 2 Bro. R. 271.

§ 18. A rent *in esse* may be conveyed by bargain and sale, as also an advowson, tithes, or any other incorporeal hereditament, because they are expressly mentioned in the statute of uses. *Taylor v. Vale*, Cro. Eliz. 166.

§ 19. Incorporeal hereditaments must, however, be in actual existence at the time, otherwise they will not arise from the bargain and sale.

§ 20. A person bargained and sold certain lands to J. S. in fee, together with a way over other lands. It was held that no right of way passed, because there was no grant of it in the indenture, but only a bargain and sale of land, and of a way over other land, which could not be good, for nothing but a use passed by the deed, and there could not be a use of a thing that was not *in esse* at the time, as a way common, &c. that was newly created; for, until such things were created, no use could be raised of them by bargain and sale. *Beaudely v. Brook*, Cro. Ja. 189.

Fox's Case,
Ante f.

§ 21. No chattel interest in lands can be conveyed by bargain and sale, because the possessor of a chattel interest has no seisin out of which a use can arise. It should, however, be observed, that where a person is seised of the freehold of lands, he may by bargain and sale create a chattel interest out of such lands, for, having a seisin in himself, he is enabled to raise a use for years, as well as for any greater estate; and, by the very words of the statute of uses, the possession is as fully transferred to a *cestui que use* for years, as to a *cestui que use* of a freehold interest: nor will an entry be necessary in such a case to vest the legal estate.

What Con-
sideration ne-
cessary.

1 Rep. 176 a.

Willes R. 677.

§ 22. A bargain and sale is merely a conveyance of a use; and as a use cannot be raised without a consideration, it follows, that no bargain and sale can be good without a consideration, which must also be a pecuniary one, for the very name of the conveyance imports a *quid pro quo*. But it is not absolutely necessary that the consideration should be mentioned in the deed, as an averment of a consideration which is consistent with the deed is admissible in evidence.

Ward v.
Lambert,
Cro. Eliz.
394.

§ 23. A person by indenture, reciting, that whereas J. S. was bound in a recognizance and other bond for him, for divers good causes and considerations, bargained and sold lands to him and his heirs. It was proved that there was no money paid, and, therefore, the conveyance was held void as a bargain and sale.

Croffing v.
Scudamore,
1 Vent. 137.

§ 24. A person, in consideration of natural love, and for augmentation of the portion, and preferment
in

in marriage of his daughter, bargained and sold lands to her. It was determined that the deed could not operate as a bargain and sale, because no pecuniary consideration was given.

§ 25. At common law, no rent could be reserved on a bargain and sale, because nothing but a use passed, which was not such an estate as the bargainor could have recourse to for a distress: but, after the statute of uses, it was resolved, that a rent might be reserved on a bargain and sale; and that the reservation of such rent, would be considered as a sufficient consideration to raise a use to the bargainee.

1 Inst. 144 a.

Wykes v.
Tyllerd,
Cro. Eliz.
595.

§ 26. When the statute of uses was made, it was immediately foreseen, that all lands would thenceforth be conveyed by bargain and sale, being a conveyance of a private nature. To prevent this, the Legislature, in the same sessions, passed an act, 27 Hen. 8. c. 16. by which it was enacted, that no manors, lands, tenements, or other hereditaments, should pass from one to another, whereby any estate of inheritance or freehold should be made by reason of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record at *Westminster*, or within the county where the lands lie, before the *custos rotulorum* and two justices of the peace, and the clerk of the peace of the same county, or two of them at the least, whereof the clerk of the peace to be one.

Must be in-
rolled.
2 Inst. 671.
Gilb. Uses 90.

§ 27. This statute requires that all bargains and sales shall be by deed indented, and the time prescribed

Title XXXII. Deed. Ch. xi. § 27—31.

for inrolment is six lunar months, to be computed from the date of the deed, which is exclusive; and if the deed has no date, then the time must be computed from the delivery.

§ 28. By the statute 5 *Eliz.* c. 26. bargains and sales affecting lands, tenements, or hereditaments, in the counties palatine of *Lancaster*, *Chester*, and the bishopric of *Durham*, are directed to be inrolled in the respective courts of those counties.

§ 29. By the statute 5 *Ann.* c. 18. it is enacted, that all bargains and sales of any manors, lands, tenements, and hereditaments lying within the west riding of the county of *York*, which shall be inrolled before the register at the public office at *Wakefield*, shall be as good as if inrolled at *Westminster*.

§ 30. By the statute 6 *Ann.* c. 35. s. 16. it is enacted, that all bargains and sales of lands, tenements, and hereditaments lying in the east riding of the county of *York*, or in the town of *Kingston-upon-Hull*, which shall be inrolled at *Beverly*, shall be as good as if inrolled at *Westminster*.

§ 31. There is a clause in this act, s. 30. that in all deeds of bargain and sale inrolled in pursuance thereof, whereby any estate of inheritance in fee-simple is limited to the bargainee and his heirs, the words grant, bargain, and sell, shall be express covenants to the bargainee, his heirs and assigns, from the bargainor, that the bargainor, notwithstanding any act done by

8

him,

him, was, at the time of the execution of such deed, seised of the hereditaments and premises thereby granted, bargained, and sold, of an indefeasible estate in fee-simple free from all incumbrances, (rents and services due to the lord of the fee only excepted), and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him, unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators, and assigns respectively, shall and may in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale.

§ 32. By the statute 8 *Geo. 2. c. 6. s. 21.* it is enacted, that bargains and sales of lands lying within the north riding of the county of *York*, shall be inrolled by the register of that riding, and shall be as effectual as if inrolled at *Westminster*. And a clause is inserted in this act, s. 35. similar to that which is stated in the preceding section.

§ 33. By the statute 10 *Ann, c. 18. s. 3.* it is enacted, that a copy of the inrolment of a bargain and sale, examined with the inrolment and signed by the proper officer, and proved upon oath to be a true copy, so examined and signed, shall in all cases be of the same force and effect, as the indenture of bargain and sale would be, if the same was produced.

Exception—
Lands in
Cities and
Boroughs.

§ 34. There is a proviso in the statute of inrolments, 27 *Hen.* 8. that it shall not extend to lands, &c. lying within any city, borough, or town corporate, wherein the mayors, recorders, &c. have authority to inroll.

§ Inst. 675.

§ 35. In consequence of this proviso, lands and tenements in cities, boroughs, &c. having the privilege of inrolment, are not within the act: for, although the intention of the statute was only to exempt them from inrolments in the courts at *Westminster*, yet the statute is worded in such a manner, that they are discharged from any inrollment at all.

§ Inst. 671.

§ 36. The words of the statute 27 *Hen.* 8. of inrolments, only extend to estates of inheritance or freehold, and, therefore, a bargain and sale of lands for a term of years need not be inrolled.

Relation of
the Inrol-
ment.

§ Inst. 674.

§ 37. In consequence of the statute of inrolments, the freehold does not pass from the bargainor until the deed of bargain and sale is duly inrolled; but, if it be inrolled within the six months, then the inrolment has such a relation back to the date or time of delivery of the bargain and sale, that the freehold is considered in law as having passed to all intents and purposes from the bargainor to the bargainee, immediately on the date or delivery of the bargain and sale; and, therefore, all incumbrances and mesne conveyances made by the bargainor between the date or delivery, and the inrolment, are void against the bargainee.

§ 38. One

§ 38. One *Sewster* being seised of certain lands in fee, by deed dated 7th *November*, bargained and sold them for money. On the 9th of the same month, he acknowledged a recognizance to another person, and, on the 20th, the deed was inrolled: a *scire facias* was brought upon the recognizance, and the question was, whether *Sewster* was to be considered as having been seised of the lands on the 9th of *November*, the deed not having been inrolled until the 20th of the same month. It was adjudged, unanimously, that *Sewster* was not seised in fee of the land on the 9th of *November*, for that, when the deed was inrolled, the bargainee was, in judgment of law, seised of the land from the date of the deed.

Mullery v.
Jennings,
2 Inst 674.
Owen 69.

§ 39. Neither the death of the bargainor or the bargainee before inrolment, will prevent the passing of the estate. And, where the bargainee dies before inrolment, his heir shall be in by descent.

2 Inst. 674.
Dymock's
Case, Cro.
Ja 408.
Hob. 136.

§ 40. Though the inrolment has relation back for the advantage of the bargainee to avoid all mesne incumbrances and conveyances, yet, when the lands are also conveyed by fine or feoffment to the bargainee before inrolment, he shall take by the fine or feoffment. Therefore, if *A.* bargains and sells to *B.*, and, before the bargain and sale is inrolled, the bargainor levies a fine, suffers a recovery, or makes a feoffment of the lands to *B.*, he will be in by the feoffment, fine, or recovery, because, when a conveyance by the common law, and one by the statute, concur, that by the common law shall be preferred. But if, in a case

2 Inst. 671.
4 Rep. 706.
Flower v.
Baldwin,
Cro.Car. 217.

of this kind, the bargainor incumbers the land between the execution of the bargain and sale, and the levying the fine, &c. then the inrolment shall have relation back for the avoiding such mesne incumbrances in favour of the bargainee.

Le Neve v.
Le Neve.

§ 41. It is said by Lord *Hardwicke*, in a case which will be stated in the 21st Chapter of this Title, that if there be a prior bargainee, whose deed is not inrolled, and a second, whose deed is properly inrolled, if this last had notice of the prior deed, the prior shall prevail in equity; and if he has any other conveyance as a feoffment, or a lease and release, the first vendee shall likewise prevail at law.

§ 42. A bargain and sale does not divest any estate, as will be shewn in the next Chapter.

TITLE XXXII.

D E E D.

CHAP. XII.

Of a Covenant to stand seised.

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|---|--|
| <p>§ 1. <i>Nature of.</i>
 2. <i>What Words necessary.</i>
 7. <i>Who may covenant to stand seised.</i>
 8. <i>What may be conveyed by.</i>
 12. <i>What Consideration necessary.</i>
 25. <i>A Rent may be reserved on a Covenant, &c.</i></p> | <p>§ 27. <i>The Estate continues until a Use arises.</i>
 28. <i>A Bargain and Sale, and Covenant to stand seised, do not divest any Estate.</i>
 31. <i>No Uses can be declared on these Conveyances.</i></p> |
|---|--|

Section 1.

THE second sort of conveyance which derives its Nature of. effect from the statute of uses, and operates without transmutation of possession, is a covenant to stand seised to uses.

Formerly, if a person had covenanted and agreed for himself and his heirs, that, for a certain consideration, another should have his lands, though the lands did not pass for want of livery, yet the covenantee acquired the use. And, now, whenever a covenant of this kind is entered into, if the consideration be sufficient, a use arises out of the seisin of the covenantor, which is immediately executed by the statute in the *cestuique use*, who thereby acquires the legal estate and possession.

Plowd. 301.
303.

§ 2. The

What Words
necessary.

1 Vent. 137.

2 Vent. 150.

Willes R. 676.

§ 2. The proper and technical words of this conveyance are, covenant to stand seised to the use of *A.*, &c. but any other words, such as grant, bargain and sell, or assign, will create a covenant to stand seised, if it appears to have been the intention of the party to use them for that purpose.

Croffing v.
Scudamore,
1 Mod. 175.

§ 3. *A.*, in consideration of natural love, augmentation of portion and preferment of his daughter *E.* in marriage, and for other good and valuable considerations, did give, grant, bargain, sell, alien, enfeoff, and confirm to *E.* and her heirs, &c. with a covenant for quiet enjoyment, and special warranty: all the court held, the land should pass by way of covenant to stand seised.

Walker v.
Hal, 2 Lev.
213.

Olman v.
Sheafe,
3 Lev. 370.

Harrison v.
Austin,
3 Mod. 237.

§ 4. A settlement was made in the following words:
“ If I have no issue, and, in case I die without issue
“ of my body lawfully begotten, then I give, grant,
“ and confirm my land, &c. to my kinswoman *Sarah*
“ *Stokes*, to have and to hold the same to the use of
“ myself for life, and, after my decease, to the use of
“ the said *Sarah*, and the heirs of her body to be
“ begotten, with remainders over.” It was held, that
this was a good covenant to stand seised.

Doe v. Simp-
son, 2 Will.
R. 22.
Willes R. 673.

§ 5. *George Simpson*, in consideration of his marriage with *Ann Storey*, gave, granted, enfeoffed, aliened, and confirmed lands to *Ann* and *William Storey* and their assigns, *habendum* to the use of *Ann Storey* for life, remainder to the heirs of her body begotten by
Simpson.

Simpson, who covenanted that the lands should remain to the said uses.

The marriage took effect, and, soon after, *Simpson* became a bankrupt. His assignees sold the land, considering the deed as void in law, or, if not, that *Simpson* was tenant in tail under it. It was resolved, that the deed should operate as a covenant to stand seised.

§ 6. *Thomas Kirkby* executed indentures of lease and release to his brother. The lease was made for a year in the usual manner. The release witnessed, that for the natural love which *Thomas Kirkby* bore to his brother, and, in consideration of 100 l. paid to him by his brother, he granted, released, and confirmed unto his brother, (in his actual possession then being by virtue of the lease for a year), after the death of the said *Thomas Kirkby*, all that close, &c. to hold the same to his brother and the heirs of his body. It was admitted, that this release was void as a common law assurance, because it was a grant of a freehold to commence *in futuro*; but the court was unanimously of opinion, that it should be considered as a covenant to stand seised.

Roe v. Trimmer, 2 Will. R. 75.
Willes R. 682.

Doe v. Sal-keld, Willes R. 673.

§ 7. A covenant to stand seised being similar, in many respects, to a bargain and sale, it follows, that no person can transfer lands by this mode of conveyance, who cannot be seised to a use.

Who may covenant to stand seised.

§ 8. It also follows, from the same principle, that no species of property can be transferred by covenant

What may be conveyed by.

tenant to stand seised, which cannot be conveyed to a use.

§ 9. A covenant to stand seised only passes lands whereof the covenantor is actually seised or entitled to in remainder at the time of the execution of the deed; because the use must arise out of the seisin which the covenantor has at the time.

Wiseman's
Case, 2 Rep.
15 a.

§ 10. A father covenanted, in consideration of natural affection, to stand seised of all the lands which he had, or should afterwards purchase, to the use of himself for life, remainder to his youngest son and his heirs. He afterwards purchased lands, and died. It was determined, that the after-purchased lands did not vest in the younger son by this deed, because a man cannot, by a covenant, raise a use out of land which he hath not.

Yelverton v.
Yelverton,
Cro. Eliz.
401.
2 Roll Ab.
790.

§ 11. If two persons are joint-tenants in fee, and one of them covenants, that, after the death of his companion, he will stand seised of all the moiety of his companion to certain uses, though the covenantor survives, yet no use shall arise, because, at the time of the covenant, he could not grant or charge his moiety.

Barton's
Case, 2 Roll
Ab. 790.

§ 12. A covenant to stand seised being a conveyance of a private nature, and valid without enrolment, it is absolutely necessary that the consideration be either affection to a near relation, or marriage.

What Con-
sideration ne-
cessary.

§ 13. If

§ 13. If a man, in consideration of the natural love which he bears to *B.* his brother, covenants to stand seised to the use of *B.* and *A.* his wife for their lives, this shall raise a good estate to *A.*, for the covenantor gives the estate to *A.* in consideration of the marriage between her and his brother.

Sharrington
v. Strotton,
Plowd. 300.

§ 14. A man covenanted, in consideration of natural love and affection to his son, to stand seised to the use of his son for life, remainder to the use of such wife as the son should marry, for life, &c. and it was held, that a use arose to the wife, she being within the consideration; for it was for the advancement of his posterity, and, without a wife, the son could not have posterity.

Bould v.
Winton,
2 Roll Ab.
786.

§ 15. A use will arise to a wife, without any consideration expressed, upon a covenant to stand seised.

§ 16. *Robert Bedell*, by indenture between him and his wife of the first part, *James* his second son of the second part, and *Michael* his third son, of the third part, in consideration of natural love and affection for his sons, covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder as to one moiety, to one of his sons, and, as to the other moiety, to the other son. The question was, whether any use arose to the wife or not. It was objected, that the wife was not within the considerations expressed in the indenture; and no other considerations could be averred than were contained in the deed. But it was answered and resolved, that a consideration

Bedell's
Case, 7 Rep.
40.

Goodtitle v.
Petto, 2 Stra.
R. 934.

fideration which stood with the deed, and was not repugnant to it, might well be averred. And when he limited the lands to the use of his wife for life, that imported a sufficient consideration in itself, and there needed no averment, for *manifesta probatione non indigent*.

§ 17. Love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seised.

Perrot's Case,
2 Roll Ab.
785. Dyer
374. pl. 16.

§ 18. A person covenanted, in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to *A.* his reputed son, (who was his bastard), for life, &c.; and also, covenanted to levy a fine, or make a feoffment for farther assurance: afterwards, he made a feoffment in fee to the covenantees, in performance of his covenant, to the same uses. It was resolved, that no use arose to *A.* the bastard by the covenant, for want of a consideration; nor could he take any thing by the feoffment, it being only made for further assurance.

Jenk. Cent.
2 Ca. 60.

§ 19. The adopting a surname is not a sufficient consideration to raise a use in a covenant to stand seised, as was resolved in *Sir Christopher Hatton's* case, who having a sister's son named *Newport*, covenanted, in consideration of his taking the name of *Hatton*, he would stand seised to his use. But it was resolved, that no use arose, for want of a sufficient consideration.

§ 20. It

§ 20. It is said, in *Roll's Abridgement*, that the consideration of ancient acquaintance, or of being chamber-fellows, or entire friends, shall not raise a use. For the obligation that a man has to his own family, is supposed, by all governments, to be superior to obligations of mere gratitude; and, therefore, the Chancery will not presume that it is the party's intent to dispose of lands out of the family, where any ceremony is absent that is necessary in law to the making such a contract.

Tit. Use,
Vol 2. 783.
Plow. 503.

Gillb. Uses 48.

§ 21. In the case of a covenant to stand seised, a use will arise to those who are within the consideration, though no use will arise to those who are strangers to it.

Paget's Case,
1 Rep. 154 a.

§ 22. Tenant in tail, remainder in fee, the person in remainder, to the intent that his lands should continue and remain in his family, name, and blood, covenanted to stand seised to the use of himself and the heirs male of his body, remainder to the use of his brothers in tail, remainder to the use of the queen, her heirs and successors. It was resolved, that a use arose to the covenantor in tail, and to his brothers; but that no use arose to the queen, for want of a consideration.

Wiseman's
Case, 2 Rep.
15 a.

§ 23. *Paul Risley*, by indenture between him and *Sir Thomas Denton*, *Sir A. Denton*, *Thomas Risley* his brother, and *W. Withers*, covenanted and agreed with them to stand seised of certain tenements, to the use of himself for life, remainder to the use of his wife for life,

Smith v.
Risley,
Cro. Car.
529.

life, remainder to the use of the covenantees and their heirs upon several trusts for his children. It was resolved, that the uses were well raised, and vested in *Thomas* his brother, he being of the blood of the covenantor, but that no use arose to the other covenantees, they being strangers.

Whaley v. Tancard,
2 Lev. 52.
54.

§ 24. *A.* covenanted to stand seised to several uses, and afterwards to *C.* for 99 years, if he should so long live, remainder to two strangers for the life of *C.* to preserve contingent remainders, remainder over. It was agreed by all, that the remainder to the two strangers was void, they not being of the blood of the covenantor, so that they could not enter for a forfeiture.

A Rent may
be reserved on
a Covenant,
&c.

§ 25. In consequence of the 4th and 5th sections of the *Statute of Uses*, a rent may be reserved on a covenant to stand seised.

Rivett v. Godson,
W. Jones 179.

§ 26. Thus, where *A.*, in consideration of natural love and affection, covenanted to stand seised to the use of himself for life, remainder to *B.* his son in tail, and to the intent that *B.* should have a rent issuing out of the lands during the life of *A.* It was resolved, that upon the words of the 4th and 5th sections of the *Statute of Uses*, *B.* was entitled to this rent.

The Estate
continues un-
til a Use
arises.
1 Rep. 154 a.

§ 27. In the case of a covenant to stand, the estate continues in the covenantor until a lawful use arises. Thus, it is said by *Manwood*, Chief Baron, that if a man makes a feoffment in fee, to the use of *A.* for life,

life, remainder to the use of *B.* for life, remainder to the use of *C.* in fee, if *A.* refuses, *B.* shall take his estate presently, for the feoffor, by his feoffment, hath given all his estate out of him, and all the uses are created out of it, as out of one and the same root; and, therefore, as long as any of the uses can take effect, the feoffor shall not have the land. But, in the case of a covenant which raiseth an use, there the consideration, which is the cause that raises every several use, is several; and all the uses grow and rise out of the estate of the covenantor; and, therefore, there, if one refuses, he who is next in remainder, shall not take the land presently, but the covenantor shall keep it.

§ 28. A bargain and sale, and covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer, for, as nothing but a use passes by those conveyances, and as no use can possibly be greater than the estate out of which it is created, it follows, that where a use is granted which is greater than the legal estate out of which such use is to issue, it is merely void, and the statute executes the possession to so much only of the use, as is lawfully granted.

A Bargain and Sale, and Covenant to stand seised, do not divest any Estate. .
Gilb. Uses
140.
Tit. 11. ch. 3.
f. 22, 23, 24.

§ 29. Thus, if a tenant for life, with contingent remainders depending on his estate, conveys away his estate for life to a stranger in fee by bargain and sale, or covenants to stand seised thereof to the use of his son in fee, the bargainor or covenantor will only take

Tit. 16. ch. 6.
f. 8.

an estate for life, and the contingent remainders will not be destroyed.

Seymour's
Case, 10 Rep.
95. 1 Atk. 2.

§ 30. In the same manner, if a tenant in tail bargains and sells his estate, or covenants to stand seised of it in fee, the bargainee or covenantee will only acquire a base fee, that is, an estate to him and his heirs, determinable on the death of the tenant in tail; and the issue in tail will not be put to his formedon on the death of his ancestor, but may enter on the lands, and bring an ejectment, because these conveyances do not create a discontinuance.

No Uses can
be declared
on these Con-
veyances.

Tit. 12: ch. 1.
§ 5. 11.

§ 31. No uses can be declared on a bargain and sale, or covenant to stand seised, but to the bargainee or covenantee; because these conveyances only pass a use, and the legal estate and possession is transferred by the statute. Now, it has been shewn, that the statute only executes the first use, and not the second; so that the second use is void in law, but is supported in equity under the name of a trust.

TITLE XXXII.

D E E D.

CHAP. XIII.

Of a Lease and Release.

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| § 1. <i>Origin and Nature of.</i>
8. <i>Who may convey by, and what.</i>
9. <i>Estates in Remainder and Reversion.</i>
12. <i>What Consideration necessary.</i> | 16. <i>A Lease and Release does not devert any Estate.</i>
17. <i>Whether a Use results on a Lease and Release.</i>
19. <i>To whom the Title Deeds belong.</i> |
|--|--|

Section 1.

THERE is a third sort of conveyance usually Origin and Nature of. classed under those which derive their effect from the statute of uses, but of which only one part is derived from that statute, and the other part from the principles of the common law. It is called a lease and release, but it is in fact a bargain and sale for a year, and a common law release, operating by way of enlargement; and owes its rise to the following circumstances.

§ 2. The framers of the statute of uses foresaw, that freehold estates would thenceforth become transferable by parol only, without any form or ceremony whatever. A clause was therefore inserted in that statute, by which all bargains and sales, of freehold estates, were required to be made by writing, indented

and inrolled. This provision, which, if it had not been evaded, would have introduced an almost universal register of conveyances of the freehold, in the case of corporeal hereditaments, was soon defeated by the omission to extend the statute to bargains and sales for terms of years.

3 Reeves
Hist. 357.

§ 3. In the times of *Hen. 6.* and *Edw. 4.* it was not unusual to transfer freehold estates in the following manner. A deed of lease was made to the party intended to be the purchaser, for three or four years, and after the lessee had entered into possession, a deed of release of the inheritance was executed to him, which operated to enlarge his estate, from a term for years, to a fee simple, and thus he became seised in fee, as completely as he could have been by fine or feoffment with livery.

4 Reeves 353.

§ 4. When it was observed that the statute of uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale for a year was made by the tenant of the freehold, to the person to whom the lands were intended to be released. This bargain and sale, in consequence of the consideration, makes the bargainor stand seised to use of the bargainee, without any inrolment; by which means the use of the term for a year is vested in the bargainee, and then the statute transfers the possession, so that the bargainee becomes immediately capable of accepting a release of the freehold and reversion; and accordingly a release is made to him, dated the day next after the day of the date of the bargain.

bargain and sale : This is held to supply the place of livery of seisin, and so a conveyance by lease and release, is considered as equal to a feoffment with livery of seisin*.

§ 5. The validity of this conveyance was formerly much doubted, and Mr. *Noy* was of opinion, that it could not be supported without an actual entry, by the bargainee on the lands. But it was determined in the Court of Wards, 18 Jac. 1., by the two Chief Justices, *Montague* and *Hobart*, and *Tanfield* Chief Baron, “ That upon a deed of bargain and sale for “ years, of lands, whereof he himself is in possession, “ and the bargainee never entered, if afterwards the “ bargainors make a grant of the reversion (reciting “ this lease) expectant upon it, to divers uses, that it “ is a good conveyance of the reversion, and the “ estate was executed and vested in the lessee for “ years, by the statute, and was divided from the “ reversion ; and not like to a lease for years, at the “ common law : for in that case there is not any ap- “ parent lessee till he enters ; but here by operation “ of the statute, it absolutely and actually vests the “ estate in him as the use, but not to have trespass “ without entry, and actual possession, wherefore

2 Mod. 252.

Lutwich v. Mitton,
Cro. Ja. 604.
Cro. Car. 110.

* *Fabian Philips* says, that this conveyance was, “ at first only “ purposely contrived by Serjeant *Francis Moore*, at the request of “ the Lord *Norris*, to the end that some of his kindred or near “ relations should not take notice, by any search of public records, “ what conveyance or settlement he should make of his Estate.”
Treat. on the Writ of Capias.

“ they would not permit this point to be further argued.

Barker v.
Keate,
2 Mod. 249.
253.

§ 6. In a subsequent case, determined in 29 *Car. 2.* where there was a bargain and sale for years, followed by a release; judgment was given by the whole court, “ That the lease being within the statute of uses, “ there was no need of an actual entry, to make the “ lessee capable of the release, for by virtue of the “ statute he shall be adjudged to be in actual possession.”

6 Mod. 44.
2 Lev. 108.

§ 7. The recital of a lease for a year, in a deed of release, is good evidence of such lease against the releasor, and all those who claim under him, but not as to others, without proving that there was such a deed, and that it was lost or destroyed.

Who may
convey by,
and what.

§ 8. Every person who is capable of being seised to the use of another, may convey his estate by lease and release; and every species of property, that is capable of being conveyed to uses, may be conveyed by lease and release.

Estates in
Remainder or
Reversion.

Cases and
Opinions,
vol. 2. p. 144.

1 Inst. 270 a
n. 3.

§ 9. An estate in remainder or reversion, expectant on an estate for years, may be conveyed by lease and release. This point is fully proved by that eminent conveyancer, the late Mr. *Beoth*, in an opinion which has been printed. He admits Lord *Coke*'s position, that a release cannot work without a possession; but contends, he only means, that the estate upon which the release is to work must be a vested estate: for in the same

folio, Lord Coke says—" If a man make a lease for
 " years, remainder for years, and the first lessee en-
 " ters, a release to him in the remainder for years, is
 " good, to enlarge his estate ;" which shows his opi-
 nion to be, that it is not necessary that the estate to be
 enlarged, should be an estate in actual possession, and
 that it suffices, if it be a vested estate, divided from
 the ultimate reversion.

§ 10. In the case of *Shortridge v. Lamplough*, which
 will be stated in a subsequent part of this chapter, the
 person who made a conveyance by lease and release,
 had only a reversion expectant on a term for years,
 and this circumstance does not appear to have been
 noticed, either by the counsel who argued the case,
 or the judges who determined it.

§ 11. It is now a common practice to convey estates
 in remainder and reversion, expectant on estates for
 life, by lease and release ; but in cases of this kind it
 is an inaccuracy to say, that the releasee is in actual
 possession of the hereditaments comprised in the bar-
 gain and sale for a year. The proper expression is,
 that they are actually vested in him, by virtue of the
 bargain and sale, and the operation of the statute of
 uses.

1 Inst. 270 a.
 " 3.

§ 12. It has been already observed, that no use can
 be raised on a bargain and sale, without some pecu-
 niary consideration, but when the conveyance by lease
 and release became a common assurance, only a no-
 minal consideration of five shillings was mentioned in

What Con-
 sideration
 necessary.

the deed of bargain and sale; and even a reservation of a pepper corn rent has been held sufficient to raise a use in a bargain and sale for a year, to ground a release.

Barker v.
Keate,
1 Freem. 249.
2 Mod. 252.

§ 13. A bargain and sale was made for a year, by the words, *demise, grant, and to farm let*, yielding and paying a pepper corn rent, and it was made a question, whether a release could operate upon it, so as to make a good tenant to the *præcipe*. It was argued, that this was only a lease at common law, for the words, *demise, grant, and to farm let*, are words used at the common law, and there was no word of consideration, nor of bargain and sale in the deed; so that it could not be intended by the parties that it should operate by way of use.—2d, That the consideration was executory, and also contingent, for this rent of a pepper corn was not to be paid unless it was demanded, which was uncertain whether it would or not; besides it was not payable presently, and a future consideration could not raise a present use.

3d, That the consideration of a pepper corn was of no value to raise a use.

But all the court was of opinion, that this lease operated by the statute of uses; for as to the first objection, they said it had been often adjudged, that though there were not the words bargain and sell, yet it would operate by way of use, there being a sufficient consideration.

As to the second objection, they held, that though this rent was to be paid futurely, yet it was a present duty, and the obligation to pay it was present, for the words, yielding and paying, make a covenant: and *North* said, that where things are done in the same instant, they would transpose them, and suppose a precedency, it being to support common assurances, and so they might suppose the covenant to pay rent, to precede the raising of the use, and then the consideration would be executed. *North* also said, he had known it ruled several times, that a lease and release in the same deed was a good conveyance, for priority should be supposed. As to the third, they all held that the value of the consideration was not material, for it was usual, if an estate was of the value of a thousand pounds a year, to make five shillings the consideration in a bargain and sale for a year; and by *Porter's case*, 1 Rep. 24. a penny was sufficient to alter the use of a feoffment, and to cause the feoffee to be seised to his own use.

Judgment was given that the word, grant, would make the land pass by way of use, and that the reservation of a pepper corn was a sufficient consideration to raise a use. 2 Mod. 253.

§ 14. There is no necessity for expressing any consideration in a deed of release to a bargainee for years, because such release is a common law conveyance.

§ 15. In error upon a judgment given in the Court of Common Pleas, the case was, that *Thomas Ashby* demised Shortridge v. Lumplugh, 2 Ld. Ray. 798.

demised the premises in question to *John Griffith*, for sixty-one years, reserving rent. That afterwards said *Thomas Asby*, by indenture dated 28th September, in consideration of five shillings, bargained and sold the premises, to Sir *William Meadows* and others, for one year, and by indenture dated 29th September, he released and confirmed the said premises, to said *Meadows* and others in fee.

It was contended that this reversion did not pass to the releasees, because there was no consideration expressed in the release, nor any use declared of it.

But all the court held that the estate was well vested in the releasees; though no consideration was expressed in the release.

A Lease and Release does not vest an Estate.

S. 600.

Willes R. 383.

§ 16. A conveyance by lease and release does not vest any estate, or create a discontinuance or forfeiture. For *Littleton* says—"By force of a release
" nothing shall pass but the right which he may law-
" fully and rightfully release, without hurt or damage
" to other persons who shall have right therein after
" his decease."

Whether a Use results on a Lease and Release.

Tit. 11. c. 4. s. 16.

2 Ld. Ray. 798.

2 Salk. 678.

7 Mod. 76.

§ 17. It appears to have been doubted, whether there can be a resulting use upon a conveyance by lease and release. In the case of *Shortridge v. Lump-leigh*, it was held that if a lease and release was pleaded to *A.* and his heirs, and no consideration appeared, nor said to whose use, it should be intended to be to the use of the releasee, and Mr. Just. *Porcell* said,

said, he was not satisfied that the nature of the conveyance would admit of a resulting use, though it was a conveyance much used to raise uses upon, to a third person, by express words, yet in strictness it was a common law conveyance. And if a lease were made for forty years, and a release thereupon without consideration, or limiting of any uses, it could not be intended to be to the use of the lessor, for the very extinguishing the estate of the lessee was a good consideration.

§ 18. Without questioning the case put by Mr. Justice *Powell*, it may be fairly contended, that in the case of a bargain and sale for a year only, and for a nominal consideration, with a release thereon, without any consideration, the use would result to the original owner, if no use was declared. For the extinguishment of a term for one year could not be deemed a consideration; and therefore there could be no ground for contending against the use resulting in this case, as well as upon a feoffment. And the Lord Ch. Just. and *Powell* agreed, that if there were a particular use limited on a release, the rest would result.

Idem.
Vide Sanders
Uses V. 2. 73.

§ 19. In cases of conveyances to uses under the statute, it is said that the possession of the deeds appertains to the feoffees, and not to the *cestui que use*, because the possession of the deeds originally belonged to the feoffees to uses, in order to enable them to defend the title to the land: and although the statute of uses transfers the legal estate to the *cestui que use*, yet it does not transfer the deeds; but this doctrine seems

To whom the
Title Deeds
belong.

1 Inst. 6 a.
n. 4.

very

very questionable, as feoffees to uses have now only a seisin of an instant, and are never called upon to defend the land. And it seems reasonable to suppose, that where a statute transfers the legal seisin of lands from one person to another ; it should also transfer the title deeds of such lands, as they must be totally useless in the hands of a person who has no connexion with the estate.

TITLE XXXII.

D E E D.

CHAP. XIV.

Of Declarations of Uses.

- | | |
|--|--|
| <p>§ 1. <i>Origin and Nature of.</i>
 7. <i>Must be in Writing.</i>
 11. <i>No Technical Words necessary.</i>
 13. <i>How the Lands should be described.</i>
 14. <i>No Consideration necessary.</i>
 15. <i>Declarations of Uses made prior to Fines, &c.</i>
 20. <i>Declarations of Uses made subsequent.</i></p> | <p>23. <i>Who may declare Uses.</i>
 24. <i>The King.</i>
 25. <i>Married Women.</i>
 33. <i>Infants.</i>
 37. <i>Idiots, Lunatics, &c.</i>
 38. <i>The Right to declare Uses is coextensive with the Estate.</i>
 41. <i>Uses may be declared on a Lease and Release.</i></p> |
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Section I.

WITH respect to conveyances derived from the statute of uses, which are said to operate by transmutation of possession, they derive their effect from the following principles.

Origin and Nature of.

Where lands are conveyed by feoffment, fine, or recovery, the legal seisin and estate becomes vested by these conveyances in the feoffee, cognizee or recoveror. But if the owner of the estate declares his intention, that such feoffment, fine, or recovery, shall enure to the use of a third person, a use will immediately arise to such third person, out of the seisin of the feoffee, cognizee, or recoveror, and the statute will transfer the actual possession to such use, without any entry or claim.

Tit. 11. c. 4.
s. 12.

§ 2. The deeds by which the uses of fines and recoveries are declared, (for feoffments to uses are discontinued,) derive their effect from the statute of uses, and are called declarations of uses. Where they are executed previous to the levying a fine or suffering a recovery, they are called deeds to *lead* the uses. But if executed subsequent to a fine or recovery, they are then called deeds to *declare* the uses of them.

Countess of
Rutland's
Case,
5 Rep. 42.

§ 3. With respect to deeds executed prior to the levying a fine or suffering a recovery, it was resolved in 2 Jac. 1. 1st, That although they were but directory, and did not bind the estate or interest of the land, yet if the fine, recovery, or other assurance was pursued according to the indentures, there could not be any bare averment against the indentures taken in such case, that after the making of the indentures, and before the assurance, by mutual agreement of the parties, it was concluded that the assurance should be to other uses. But if another agreement or limitation of uses was made by writing, or by other matter, previous to the fine or recovery, as high or higher, then the last agreement should stand.

2d, That if the form of the indentures was not pursued, as to the quantity of land, or the time within which, &c. an averment might be made, that the fine or recovery was to another use or interest.

3d, That although the indentures were not pursued in circumstances of time, quantity, person, &c. yet, if no other new mean agreement could be proved, the
assurance

assurance should be to the uses contained in the indentures.

§ 4. With respect to the deeds executed subsequent to the levying a fine or suffering a recovery, it was formerly doubted whether they would operate so as to direct the uses of such prior fine or recovery; because where a fine was levied or a recovery suffered, without consideration, the use of the land immediately resulted back to the original owner; and when the use was once vested, it was doubted whether it could afterwards be divested, by any subsequent declaration or agreement. But it was resolved in 3 & 4 *Philip & Mary*, that a deed executed four years after a recovery had been suffered, was sufficient to declare the uses of such precedent recovery. And in a subsequent case, 28 *Eliz.* it was unanimously resolved, that an indenture, subsequent, was sufficient to direct and declare the uses of a precedent recovery: and the words of the deed being, that the intent and meaning of the parties at the time of the said recovery was, that the recoverors should stand seised to the uses set forth in the indenture, and to no other use, intent, or purpose, no averment could be admitted to prove that no such uses had been declared, at the time when the recovery was suffered; and the subsequent deed proved that there was a present, certain, and complete agreement, and declaration of the uses, at the time of the recovery, for so the indenture expressly purported.

Tit. 11. c. 4.
s. 16.

Arthur v.
Basset,
Dyer 136.

Dowman's
Case,
9 Rep. 7 b.

§ 5. A deed

§ 5. A deed executed after the suffering a recovery may be controlled by a subsequent deed.

Vavisor's
Case,
Dyer 307 b.

§ 6. Thus, where a feme sole suffered a recovery of her estate, and by an indenture subsequent, made between her and *A. B.*, whom she afterwards married, agreed, that after the solemnization of the marriage, the recoverors should stand seised to the use of the husband and wife and their heirs: The marriage took effect, and afterwards the recoverors conveyed the estate to the husband and wife and their heirs. Some time after the husband and wife, by indenture made between them, and the heir of the wife, on the part of her father, reciting, that as the land came to her from her father, and as she had no issue, notwithstanding the indenture and conveyance aforesaid, the true intent was only that the issue of the body of the wife should inherit the land, and for default thereof her right heirs; It was agreed that the husband and wife, in future, should stand seised thereof to the use of themselves in special tail; remainder to the right heirs of the wife. It was resolved that the uses were altered by the second deed.

Must be in
Writing.

§ 7. Thus stood the old law respecting declarations of uses. But, it was enacted by the statute of frauds, 29 Ch. 2. c. 3. s. 7. “ That all declarations or crea-
“ tions of trusts or confidences, of any lands, tene-
“ ments, or hereditaments, shall be manifested and
“ proved by some writing, signed by the party who is
“ by law enabled to declare such trust, or by his last
“ will

“ will in writing, or else they shall be utterly void,
“ and of none effect.”

§ 8. Upon the construction of this statute, Lord Ch. Just. *Holt* appears to have been of opinion, that 7 Mod. 76. uses might be declared by writing only, without seal.

By the statute 4 *Ann.* c. 16. s. 15. reciting, that it had been doubted, whether, since the statute of frauds, the declarations or creations of uses, trusts, or confidences, of any fines or common recoveries, manifested by deed, made after the levying or suffering of such fines or recoveries, were good and effectual in law; it is thereby declared—“ That all
“ declarations or creations of any uses, trusts, or
“ or confidences, of any fines or common recoveries,
“ of any lands, &c. manifested and proved, or which
“ thereafter should be manifested and proved, by any
“ deed then made, or thereafter to be made, by the
“ party who was by law enabled to declare such uses
“ or trusts, after the levying or suffering of any such
“ fines or recoveries, were and should be as good
“ and effectual in the law, as if the said act had not
“ been made.

§ 9. It is observable that in this statute, the word deed is used instead of writing, from whence it may be contended that a deed to which a seal is essential is now required in all cases, to declare uses; but this statute does not repeal the clause alluded to in the statute of frauds, it is only explanatory of it, and if

taken literally, can only be extended to declarations of uses made subsequent to a fine or recovery, and not to those made prior.

Exception,
Doug. 25.

§ 10. The clause in the statute of frauds, which requires that declarations of uses, trust, and confidences, should be in writing, extends in the case of fines, to third persons only, and not to the cognizors and cognizees of the fine. For the resulting use to the cognizors may be rebutted in favour of the cognizees, by parol evidence, shewing such to have been the intention of the parties. The cases on this subject have been already stated.

Vide Tit. 11.
ch. 4. l. 38.

No Technical
Words necessary.
1 Ld. Raym.
290.
3 P. Wms.
209.

§ 11. No technical words are necessary in a declaration of uses, and Lord Ch. Just. *Holt* has said, that it is not absolutely necessary to insert the word use, in the declaration of uses of a fine; for any kind of agreement which manifestly shews the intent of the parties, will be sufficient.

1 Ld. Raym.
291.
12 Mod. 163.

§ 12. It is laid down by Lord *Holt*, *arguendo*, that if *A.* bargains and sells to *B.* and his heir, and the deed is not inrolled; or if a deed of feoffment is not executed by livery; if a fine be levied between the same parties, the deed of bargain and sale, or feoffment, will declare the uses of the fine.

How the
Lands should
be described.

§ 13. In a declaration of the uses of a fine or recovery, the lands ought to be described with as much minuteness as in a feoffment or grant: for as lands are described in a fine or recovery in the same manner

as

as in a *præcipe quod reddat*, that is, only by the number of messuages, cottages, acres of arable, meadow, &c. it is proper to have a more particular description in the deed of uses, which is the measure that usually guides juries in ascertaining the estates comprised in a fine and recovery. And there are many instances where the Court of Common Pleas has directed the description of lands in fines and recoveries to be amended, in conformity to the deed by which the uses were declared: hence there is an obvious propriety in connecting the description in the fine, with the description in the deed. There is also an advantage in stating in the deed, the description contained in the fine.

Vide Tit. 35.
36.

§ 14. No consideration is necessary to raise uses on a fine or recovery, although in the case of a bargain and sale, and covenant to stand seised, it has been shewn that a consideration is absolutely necessary. The reason of this difference is thus explained by Mr. *Hargrave*—"In the former case" (that of a declaration of uses) "the estate is passed completely from the grantor or donor, without the aid of a court of equity, and therefore it is immaterial whether the use declared on the estate is gratuitous, or not; it being sufficient that the grantees or donees receive it, coupled with a trust or use. But in the latter case (*viz.* that of a bargain and sale, or covenant to stand seised) the transaction rests in covenant or agreement, between the covenantor or bargainor and the *cestui que use*, and if the covenant or agreement was not founded on the consideration of

No Consideration necessary.

1 Ld. Raym. 290.

1 Inst. 123 a. n. 8.

“ blood, or a valuable consideration, such as marriage
 “ or money, our courts of equity, which, till the
 “ 27 Hen. 8. had the sole cognizance of uses, would
 “ not interpose to compel the performance. In fewer
 “ words, chancery would enforce uses annexed to a
 “ perfect gift, however gratuitous they might be, but
 “ not those resting on a naked contract, without even
 “ so much as the consideration of blood to maintain
 “ them.”

Declarations
 of Uses made
 prior to Fines
 or Recoveries.

Ante f. .

§ 15. It has been stated, that where a deed declaring the uses of a fine or recovery is executed, previous to the levying the fine or suffering the recovery, it is called a deed to lead the uses of such fine or recovery; and although the statute of frauds requires, that all declarations of uses shall be manifested by some writing, which excludes all averments, yet no other alteration in the law, as laid down in the Countess of Rutland's case, has taken place.

Jones v.
 Morley,
 1 Ld. Raym.
 287.
 2 Mod. 159.

§ 16. *Ann Bowyer* being seised in fee of the manor of *Trencham*, by indentures of lease and release, in consideration of a marriage then intended between her and *Edward Morley*, and an agreement on the part of *Morley*, to settle a jointure on her of 300*l.* a year, conveyed the same to trustees, in trust for herself and her heirs, until the marriage took effect, and the jointure was made, and afterwards to the use of *Edward Morley* and his heirs. The marriage took place, and soon afterwards a second deed was executed, dated 29th *January* 1665, between the said *Edward* and *Ann* of the first part, and trustees on the

the other part, reciting, that a fine was already acknowledged and agreed to be levied in due form of law, next *Hilary* term, between the trustees named in that deed, and the said *Edward* and *Ann* his wife, of the said manor of *Trencham*, it was declared that the same should enure, to the use of the said *Edward* and his heirs. Two days after the execution of this last deed, and before the fine was levied, a writing indented was executed between the said *Edward Morley* of the one part, and the said *Ann* his wife, of the other part, whereby they both, in consideration of the marriage, and other good causes, did covenant, consent, and agree to revoke all former grants, bargains, contracts, writings, covenants, and obligations, made or done between them, until the said *Edward* had performed the agreements in the said marriage settlement, on his part; and that in default thereof, it might be lawful for the said *Ann* and her heirs, to enter into the said manor and land, conveyed by the said settlement, without the let of the said *Edward* or his heirs.

The fine was levied *octabis Purificationis*, which was the 9th of *February* in that term. *Edward Morley* did not settle a jointure, pursuant to the agreement, and *Ann* his wife died without issue. The question was, whether the fine should enure to the use of *Edward Morley* and his heirs, according to the deed of the 29th *January*; or to the use of *Ann* his wife, and her heirs, according to the deed of the 31st *January*.

The Court of King's Bench was unanimously of opinion, that the fine did not enure to the uses declared by the deed of the 29th of *January*; but that this deed was controlled by the writing of the 31st of *January*; to prove which Lord Chief Justice *Holt* premised three things. 1st, If it be covenanted by deed to levy a fine of lands, &c. to such persons and uses, and the fine is levied pursuant to the deed; no proof whatever, by parol, shall be admitted, to prove that this fine was levied to other uses than those which are contained in the deed; but a subsequent deed may alter the uses of the fine, though a parol agreement (as this writing between a husband and wife is not a deed, but amounts to a particular declaration) cannot. But if there be a variance between the deed and the fine, in any circumstance, then the parties may aver the fine to be levied to other uses.

2d, Though there be a variance between the deed and the fine, yet if nothing appear to the contrary, the fine shall be taken to be to the uses of the deed, and in that case the deed is not only evidence of the uses, but the fine is by construction of law to the uses of the deed.

3d, If the fine had agreed with the deed, the uses limited by the deed could not have been controlled by the writing of the 31st *January*; because, though the deed of a feme covert is not valid in law, yet the deed having relation to the fine takes validity from thence, and will conclude her.

From

From these premises his lordship concluded, that the fine could not be to the use of the deed of the 29th of *January*, because the fine to be levied by that deed ought to have been levied the *Hilary* term next following, exclusive of that *Hilary* term in which the deed was made: but the fine was levied in the same *Hilary* term in which the deed was made, and therefore there was a variance between the fine and the deed, and consequently room was left for averment; for if the deed had been pursued, the wife would have had twelve months to see whether the husband would perform the marriage agreement, and if he would not, she might have refused to join in levying the fine, of which benefit she was deprived, by its having been immediately levied. Then the husband, by the writing of the 31st of *January*, agreed to the terms stipulated in the marriage settlement, and the fine was levied accordingly, from whence it manifestly appeared, that the agreement contained in the deed of the 29th of *January* was relinquished, and the new agreement of the 31st was designed to lead the uses of the fine.

It was agreed by the whole court, that the writing of the 31st of *January* was a sufficient declaration of the uses of the fine; and if it were not, yet it would be sufficient to controul the deed of the 29th, for it was there agreed, that all deeds, conveyances, &c. made in contradiction to the marriage settlement, should be null and void; then if no use could arise under the deed of the 29th, the use resulted to the

wife and her heirs, and judgment must be given for the heir of the wife.

Show. Parl.
Ca. 140.

Upon a writ of error this judgment was affirmed by the House of Lords.

§ 17. A second deed to lead the uses of a fine or recovery, must be executed by all those who were parties to the first deed, and were concerned in interest, in order to render the first deed void; for if the second deed be only executed by some of the parties concerned in interest, and not by all of them, it will not avoid the first deed.

Stapilton v.
Stapilton,
1 Atk. 2.

§ 18. *Philip Stapilton* being tenant for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder to his first and other sons, and having two sons, *Henry* and *Philip*; the father and sons, by deeds of lease and release, dated the 9th and 10th September 1724, conveyed the premises to two persons as tenants to the *præcipe*, for the purpose of suffering a common recovery, which was to enure, as to part, to the use of *Philip* the father for life, remainder to *Henry* the son for life, remainder to his first and other sons in tail, remainder to *Philip* the son for life, remainder to his first and other sons in tail, &c. There were covenants to suffer a recovery within twelve months, and likewise for further assurances. Before any recovery was suffered, *Henry* the son died, leaving issue *Henry* the plaintiff. Afterwards, by lease and release,

12th and 13th *April* 1735, to which the heir of the surviving trustee, in the original settlement of 1661 was a party, *Philip* the father and *Philip* the son covenanted to suffer a recovery of the same premises, to the use (as to part) of *Philip* the father, his heirs and assigns; and as to the other part, to the use of *Philip* the father for life, remainder to *Philip* the son in fee.

In *Trinity* term 1725, a recovery was suffered, in which were the same tenant to the *præcipe*, the same demandant and vouches (except *Henry* who was dead) as were covenanted to be by the first deed. It was likewise suffered within twelve months after the execution of the first deed. It was proved in the cause that *Henry* the son, who died before the recovery was suffered, was a bastard; and the question was, whether the son of *Henry* was entitled to the premises under the declaration of uses made in the year 1724? or whether that declaration was avoided by the subsequent declaration in 1725?

Lord Hardwicke.—The first question in this case is, whether the lease and release of the 9th and 10th of *September* 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of *April* 1725? I am strongly inclined to think that the lease and release of 1724, will amount to a good declaration of the uses of the recovery. This question depends on the construction of law, and the authority of cases upon the declaration of uses. It is true, where there is an agreement to suffer

8

a recovery,

a recovery, and uses are declared, if the recovery is afterwards suffered, though it varies in point of time from the recovery covenanted to be suffered; yet if there be no subsequent declaration of uses, the recovery will enure to the uses so declared; and before the statute of frauds, if the deed declaring the uses had not been pursued, a parol declaration of the uses would have been admitted; but if there was a deed declaring the uses, and the recovery was suffered accordingly, that would, before the statute, have excluded a parol declaration of new uses. But even now there may be a subsequent declaration of other uses, but that declaration must be in writing, and such a new declaration of uses depends upon the agreement of the parties: therefore though it was said at the bar, that the declaration of uses is in the power of the tenant in tail, and that he may declare new uses, I take that not to be law; for such subsequent declaration of uses must be by all the parties concerned in interest; and in the case of the Countess of Rutland, it is not laid down that the tenant in tail may declare new uses, but it is said, *whilst it is directory only, new uses may be declared*; and the meaning of that is, that as the new uses must arise out of the agreement of the parties, the parties may change the uses, but that must be done by the mutual consent of all the parties concerned in interest, and in that case it was a mutual agreement of all the parties. But in the present case, the second agreement not being between all the parties concerned in interest, ought not to controul the first declaration, and especially as the recovery was suffered within the time prescribed by the

the first deed, and between the same demandant and tenant.

§ 19. A man and his wife, in the year 1692, made a mortgage of the wife's estate, and covenanted in the mortgage deed to levy a fine of the premises in the *Easter* term following. The fine was not levied till *Trinity* term 1695. Afterwards, but in the same year, in consideration of more money, they joined in a conveyance of the equity of redemption, and covenanted that the fine which had been levied should be to the uses of this last deed.

Fleetwood v. Templeman,
2 Atk. 79.

Lord *Hardwicke* said, he was inclined to think, as the covenant to levy the fine under the first deed was confined to a particular term, and was not levied till after that, the husband and wife might by the deed in 1695, covenant that the fine which had been levied, should be to the uses of the latter deed; and that the former deed in 1692 might be laid out of the case, as the covenant under it for levying the fine in *Easter* term was not strictly pursued.

§ 20. With respect to declarations of uses executed after a fine has been levied or a recovery suffered, the principles laid down in *Dowman's* case, and *Vauvise's* case, have been applied to them in modern times, as fully as they were previous to the statute of frauds. And in a modern case, a deed declaring the uses of a fine four years after it was levied was determined to be good, the jury having found that the fine was levied to the uses of the deed.

Declarations
of Uses made
subsequent.

Bushell v.
Burland,
11 Mod. 196.
Holt. R. 733.

§ 21. *A.* and *B.* his wife levied a fine, and four years after they, by deed, declared the uses of it, in which were the following words—"All and every fine or fines, levied or to be levied, shall be to the uses of the deed."

The question was, whether the uses of the fine were well and sufficiently declared by this subsequent deed.

Lord Chief Justice *Holt* delivered the opinion of the Court, that the uses were well declared, the jury having found that the fine was levied to the uses therein declared. The court was also of opinion, that notwithstanding the statute of frauds, a subsequent deed is now as good, as it was before that statute was made.

§ 22. It is now the usual practice, where a fine is intended to be levied to uses, to execute a deed previous to the fine, in which the intended cognizor covenants to levy a fine and a declaration is inserted in the deed, of the uses to which the fine, when levied, shall enure. And where a recovery is intended to be suffered, a deed is executed to make a tenant to the *præcipe* with an agreement to suffer a recovery, and a declaration of the uses of the recovery is inserted in the deed.

Who may
declare Uses.

§ 23. With respect to the persons who are capable of declaring uses, not only all those to whom the law, in other instances, gives a disposing power, are capable

ble of declaring uses, but also some persons who are incapacitated from conveying away their estates by any other kind of assurance.

§ 24. It is said by Lord *Bacon*, that the king may declare a use on his letters patent, though, if no use be declared, the letters patent imply a use. The King.

§ 25. As a married woman is allowed to join with her husband in levying a fine, or suffering a recovery, and to bind herself by those assurances, she is also allowed to join with her husband in declaring the uses of such fine or recovery; for, otherwise, the privilege of joining with her husband, in levying a fine, or suffering a recovery, would be nugatory, as the estate would immediately result to the former uses. Married Women.
Vide Tit. 35, 36.

Vide Tit. 11.
ch. 4. f. 16.

§ 26. If the husband alone declares the uses of a fine, levied by him and his wife of the lands of the wife, it will bind the wife, unless her dissent appears; for, when she joined her husband in the fine, it shall be presumed that she also joined him in the agreement, respecting the declaration of the uses, unless the contrary is proved. 2 Rep. 57 a.

Luther v.
Banbing,
Dyer 290 a.
Harrington's
Case, Ow. 6.

§ 27. A husband and wife joined in a fine of the wife's lands to a purchaser, and, afterwards, the husband alone declared the uses of it by articles. The question was, whether it should bind the wife. Swanton v.
Raven,
3 Atk. 105.

Lord *Hardwicke*.—As no other deed is shown that declares different uses, and the uses declared do not vary

vary from what the wife intended, it shall bind her notwithstanding. And, therefore, the bill which she has brought, after an acquiescence of fifteen years since her husband's death, for possession, on suggestion that she is not bound by the fine, as she did not join in the articles with the husband, must be dismissed.

Webb v.
Worsfield,
2 Roll Ab.
798.

§ 28. If a husband and wife levy a fine of the wife's estate, and an indenture is prepared in the name of the husband and wife, declaring the uses of such fine, and the husband seals and delivers it, but the wife refuses to do so, it will not bind her, because her refusal to execute the declaration of uses is a sufficient proof of her dissent.

Gilb. Uses
248.

2 Rep. 57 b.

§ 29. If the wife alone declares the uses of a fine, levied by her and her husband of her land, such declaration will be void, because, being *sub potestate viri*, she cannot limit the use without the concurrence of her husband. On the other side, the husband, who has no estate in his own right, cannot declare the uses of such a fine, without the express or implied concurrence of the wife; so that the one is not *sui juris*, although she has the estate, and the other is *sui juris*, but has not the estate: hence it follows, that when they make different declarations, such declarations are both void.

Beckwith's
Case,
2 Rep. 56.

§ 30. *Christopher Kenne*, and *Elizabeth* his wife, being seised in fee, in right of the said *Elizabeth*, an indenture was executed by *Elizabeth*, without the consent of her husband, by which the said *Elizabeth* alone
limited

limited and declared the uses of a fine, which afterwards should be levied. Eight years after, the husband executed an indenture, without the consent of his wife, by which uses were declared, different from those contained in the indenture executed by the wife. The fine was afterwards levied by the husband and wife, to the conusees mentioned in the indenture executed by the wife, and it was found that there were no other uses declared of it.

It was determined, that both the limitations and declarations of the uses were void; and that the said fine was, by construction of law, to the use of the wife and her heirs.

§ 31. It was also resolved in this case, that, if the husband and wife agree in the declaration of the uses of part of the land, and vary in the declaration of the residue, it will be good for the part in which they agree, and void for the residue. “ For (says *Gilbert*) “ as to that part in which they both agree, all the “ requisites are found necessary to make a declaration; “ and the defect of the other part can have no influence on that which is good: but if they agree in “ the limitation of uses for part of the estate in the “ land, and disagree in the other estates, there, all is “ void; for else there will be another moulding of the “ estates than the wife designs, and her consent is requisite to every estate that shall be created by the “ limitation of uses, and it is to be ordered by her direction. Thus, if the husband declares the uses to “ himself and wife for life, the remainder to the heirs “ of

2 Rep. 58 a.

Gilb. Uses
216.

“ of the wife, and the wife declares the uses to her-
 “ self for life, and then to her own right heirs, both
 “ declarations are void, and it shall not stand good for
 “ the remainder in fee, and be void for the rest, for,
 “ the estate moving from the wife, whatever uses do
 “ take effect must be by her direction and consent, and
 “ in the manner she pleases: though the husband has
 “ power over the estate of the wife during coverture,
 “ yet, if she declares the use one way, and he an-
 “ other, his direction is absolutely void, and it shall
 “ not stand during the coverture. The reason of the
 “ difference seems, that, in other cases, the husband,
 “ having power over the wife’s estate, he may grant
 “ an interest as from himself during the coverture, for
 “ so long as he has power over her estate; but when
 “ they levy a fine in fee, the estate passes solely and
 “ entirely as one estate in fee-simple from the wife,
 “ and the uses that are declared thereupon, must be all
 “ with the consent of the wife for the whole estate;
 “ because the whole estate and interest passes from the
 “ wife.”

Johnson v.
 Cotton,
 Skin. 275.

§ 32. It was laid down in a subsequent case, that if
 a married woman alone declares the uses of a fine, the
 assent of her husband shall not be intended, if nothing
 appears to the contrary. But the declaration is void,
 unless an express assent appears.

Infants.
 2 Rep. 58 a.
 10 Rep. 42 b.
 Bac. Read.
 67.

§ 33. It is said by the Judges in *Beckwith’s* case,
 that if an infant levies a fine, and declares the uses of
 it, such declaration shall bind him, as long as the fine
 remains in force; for, inasmuch as he hath been ad-
 mitted

mitted by the Judges to levy a fine, the law will permit him to declare the use thereof, and such declaration will be valid as long as the fine.

§ 34. It has, however, been determined, that an agreement entered into by an infant, to levy a fine, and suffer a recovery, when he came of age, to certain uses, will not operate as a declaration of the uses of such fine or recovery.

§ 35. The Earl of *Ferrers* being tenant for life, with remainder to his first and other sons in tail male, and having a son who was about 17 years old, a very advantageous match had been agreed upon between such son and a young lady, and articles were entered into by Lord *Ferrers* and his son, whereby Lord *Ferrers* covenanted, that he and his son should, within a year after the son came of age, by fine or recovery, settle the bulk of his estate to the use of the son for life, remainder to his first and other sons in tail, &c. The marriage took effect, and the infant son having thus executed this deed during his infancy, afterwards came of age, and, pursuant to his covenant, joined with his father in levying a fine and suffering a common recovery; but there was no declaration of uses. The question was, whether these articles amounted to a declaration of the uses of the fine and recovery? And it was determined by Sir *Joseph Jekyll*, that they did not.

Nightingale v. Ferrers,
3 P. Wms.
207.

§ 36. An infant covenanted to levy a fine by such a time, to such uses. Before the time he came of age, then

Frost v. Wolverston,
1 Stra. 94.

then the fine was levied : and, by another deed made at full age, he declared it to be to other uses. The court held, the last deed should be that which should lead the uses.

Idiots and Lunatics, &c.

§ 37. It is also said, that if a person who is *non compos mentis*, such as an idiot or lunatic, is permitted to levy a fine, his declaration of the uses of it will be good. But, in cases of this kind, as well as those of infants, the Court of Chancery will interfere.

Vide Tit. 35. and 36.

The Right to declare Uses is co-extensive with the Estate.

2 Rep. 57 b. Noy 21. 27.

§ 38. The right of declaring the uses of a fine or recovery, is precisely co-extensive with the quantity and nature of the estate or interest which each of the parties has in the lands. If, therefore, a tenant for life, and the person having the remainder or reversion, join in levying a fine or suffering a recovery, they may declare the uses according to their respective estates in the land.

2 Rep. 58 a. Palm. 405.

§ 39. So, if there be two joint-tenants, who join in levying a fine or suffering a recovery, and one declares the use in one manner, and the other in another manner : each of them shall be good for their respective parts ; because the declaration of the use shall be directed and governed according to their several estates and interests.

Roe v. Pop- ham, Doug. 24.

§ 40. It was held, in a modern case, that where a fine was levied by tenant for life, remainder-man in tail, and reversioner in fee, a declaration of uses by the tenant for life, and remainder-man in tail, did not bind the reversioner.

§ 41. A use

§ 41. A use may be declared on a release as well as on a fine or recovery ; and it has been the constant practice, for this last century, to make all settlements by a bargain and sale for a year, and a release to uses : in such case, the uses arise out of the seisin of the releasces, and the uses of the release are usually declared in the same deed by which the lands are released.

Uses may be declared on a Lease and Release. Cases and Opinions, v. 2. p. 289.

§ 42. It should, however, be observed, that no person can declare the uses of a release, who is not capable of transferring lands by that mode of conveyance ; and, therefore, a declaration of the uses of a release by a married woman, or an infant, would be void.

TITLE XXXII.

D E E D.

CHAP. XV.

Of Powers of Revocation and Appointment.

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| <p>§ 1. <i>Nature of.</i>
 3. <i>Division of Powers.</i>
 4. <i>Powers relating to the Land.</i>
 5. <i>Powers appendant.</i>
 7. <i>Powers in Grofs.</i>
 9. <i>Powers Collateral.</i>
 11. <i>In what Deeds inserted.</i>
 12. <i>By what words created.</i>
 18. <i>A Power of Appointment implies a Power of Revocation, but not e contra.</i></p> | <p>§ 19. <i>A Power of Appointment includes a Right to reserve a new Power.</i>
 21. <i>Exception—Powers Collateral.</i>
 23. <i>To whom Powers may be given.</i>
 24. <i>Infants.</i>
 26. <i>Married Women.</i>
 33. <i>Who may be Appointees.</i>
 34. <i>A Power of Appointment does not suspend the vesting of Remainders.</i></p> |
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Section 1.

Nature of.
Vide Tit. 11.
ch. 4. f. 4, 5,
6, 7.

IT has been stated in a former Title, that powers of revocation and appointment may be inserted in all conveyances which derive their effect from the *Statute of Uses*; and, when executed, the uses originally declared cease, and new uses immediately arise out of the seisin of the cognizees, recoverors, or releasees, to the person named in the appointment; and the statute transfers the legal estate to the appointees, who, by that means, acquire the legal estate and possession.

§ 2. Powers were soon found to be much more convenient than conditions, and were therefore generally

rally introduced into family settlements ; and, although several of these powers are not usually called powers of revocation, such as powers of jointuring, leasing, and charging lands with the payment of a sum of money, yet all these are in fact powers of revocation, for they operate as revocations *pro tanto* of the preceding estates.

§ 3. Powers of revocation and appointment may be reserved, either to the original owners of the land, or to mere strangers ; from whence arises the general division of powers into those which relate to the land, and those which are collateral to it.

Division of Powers.
Gilb. Uses 141.
Hard. R. 410.
415. Cowp. R 263.

§ 4. Powers relating to the land, are those which are given to some person having an estate or interest in the land, over which they are to be exercised. These powers are again subdivided into two sorts : Powers Appendant, and in Gross.

Powers relating to the Land.

§ 5. A power appendant, is where a person has an estate in land, with a power of revocation and appointment, the execution of which falls within the compass of his estate ; as, where a tenant for life has a power of making leases for a certain number of years.

Powers Appendant.

§ 6. It was resolved in Sir *Edward Clere's* case, that if a man, seised of lands in fee, makes a feoffment to the use of such person or persons, and of such estate and estates as he shall appoint by his will, that, by operation of law, the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till de-

6 Rep. 18 a.
1 Inst. 216 a.
n 2. Vide
Cox v. Cham-
berlain, in-
fra, ch. 16.

claration and limitation be made according to his power.

Powers in
Gross.

§ 7. A power in gross is, where a person has an estate in the land, with a power of revocation and appointment, the execution of which falls out of the compass of his estate; but, notwithstanding, is annexed in privity to it, and takes effect in the appointee, out of an interest vested in the appointor.

§ 8. Thus, where a tenant for life has a power of creating an estate, to commence after the determination of his own, such as a power to settle a jointure on his wife, or to create a term for years, to commence in possession after his own death, these are called *Powers in Gross*; because the estate of the person to whom they are given, will not be affected by the execution of them.

Powers col-
lateral.

Booth's Opin.
Cases & Opin.
vol. 1. 421.

§ 9. Powers collateral, are those which are given to mere strangers, having no estate or interest in the land. Thus, where powers of sale and exchange are given to trustees in a marriage-settlement, they are said to be collateral to the land, being reserved to strangers.

Cowp.R.263.

§ 10. A power relating to the land, is part of the old dominion, and is therefore favourably expounded: whereas a power collateral to the land, being reserved to a mere stranger, is considered in the light of a bare authority, and is therefore construed strictly.

§ 11. Powers

§ 11. Powers are, in general, only inserted in deeds which operate by transmutation of possession, that is, in declarations of uses of fines and recoveries, or in releases; for it is somewhat doubtful, whether powers can be inserted in a bargain and sale, or covenant to stand seised, because, in these, a consideration is absolutely necessary; and powers are often given to raise estates without any consideration. In what Deeds inserted. Goldsb. 173.

§ 12. In the creation of a power, there is no necessity for any technical words, as it will be sufficient, if the intention of the party who creates the power, be clearly manifested. By what Words created.

§ 13. Thus, where the words, “and if the said *A. B.* shall make any estate in fee-simple or fee-tail, “then the use shall be,” &c. were inserted in a deed without mentioning what lands, it was resolved, that they should be intended of the lands comprised in the deed, and should be a sufficient creation of a power. Snape v. Turton, 2 Roll. Ab. 262.

§ 14. So, if the words are, “it shall be lawful for “*B.* to alter, change, &c. any use, and to limit “new—or that, after altering, changing, &c. said “uses, the fine should be to the uses newly limited.” Moo. 611.

§ 15. *A.*, on his marriage with *B.*, conveyed lands to *C.* in trust for himself for life, remainder to *B.* for life, remainder to the heirs of their two bodies, remainder to *A.* in fee: proviso, that in default of issue of the marriage, *C.* should convey to such uses as the survivor should appoint. *A.* devised the land to *D.*, and died without issue. Epif. Oxon v. Leighton, 2 Vern. 377.

Tit. 16. c. 5. Lord Keeper *Wright* said, that Lord *Dyer's scintilla juris* f. 4. remained in C., and though the proviso was unskillfully penned, yet it amounted to a power of revoking and limiting new uses.

Kilmurry v. Geery, 2 Salk. 538. Boycot v. Cotton, 1 Atk. 552. Lewis v. Freke, 2 Vef. Jun. 507. § 16. Where a person has a power to charge land with a certain sum of money, he may also charge it with the payment of the interest of such sum; for the intention is, to charge the land with the principal money, and that of course carries interest, otherwise no one would lend the money.

Beale v. Beale, 1 P. Wm. 244. § 17. Where there was a power to charge lands with portions for younger children, living at the father's death, a child *in ventre sa mere* was considered within the power; for it may be well looked upon, in equity, to be living at the father's death, *in ventre sa mere*.

A Power of Appointment implies a Power of Revocation, but not *à contra*.

1 Cha. Ca. 242. Anon. 1 Stra. R. 584.

§ 18. Although a power of appointing new uses implies, in itself, a power of revoking the former uses, because, otherwise, the power of appointing new uses could not be effectuated; yet a power of revocation only, does not imply a power of appointing new uses. This point is contradicted by Lord Keeper *Finch*. But Sir *John Strange* reports, that upon a trial at Bar in *Easter term* 10 Geo. 1., the Court of King's Bench was of opinion, that a power of revocation alone did not enable a person to limit new uses. If, upon such revocation, the person became seised in fee, he might dispose of the lands by deed or will, but not by a new declaration of uses.

§ 19. A power

§ 19. A power of appointment relating to the land, includes in itself a right to appoint, either absolutely, or with a new power of revocation and appointment. But if a person once executes a power of revocation and appointment of new uses, over the whole estate, his power is thereby completely exhausted, unless he reserves to himself a new power of revocation and appointment.

A Power of Appointment includes a Right to reserve a new Power.

§ 20. *Sampson Hele*, being seised in fee of the lands in question, conveyed them in 1684, by lease and release and fine, to trustees, to the use of himself for life, remainder to the use of his son for life, remainder over. In the release, there was a power given to *Sampson Hele* to revoke the uses contained therein, and to limit other uses ; and also, to revoke or alter such new limitations, and to declare other uses.

Hele v. Bond,
1 Ab. Eq. 342.
Prec. in Ch.
474.

Sampson Hele did accordingly, by deed-poll, in 1687, reciting his power, revoke the uses limited in the release of 1684, and appointed new uses.

Sampson Hele, by indenture in 1704, between him and trustees, reciting the release in 1684, and the power of revocation therein contained, and also the deed-poll of 1687, by which he had revoked the first uses and limited new ones, *did, according to the power and authority to him by the said recited indenture, and the proviso therein specified and contained, given and reserved*, revoke the uses limited by the deed-poll, and, by virtue of the said power, appointed new ones.

The question was, whether the deed-poll of 1687, and the uses thereby limited, were well revoked by the indenture of 1704.

The Lord Chancellor declared, that this was a new case, and that he did not find any authority to warrant such a revocation; nor was there an instance in any of the authorities, which were insisted on, of any such power of revocation; but referred it to the Judges of the King's Bench for their opinion, whether the uses limited by the deed-poll of 1687 were well revoked by the indenture of 1704, by virtue of the power of revocation contained in the indenture of 1684.

The Judges of the King's Bench certified their unanimous opinion to be, “ that the power of revocation
“ in the indenture of 1684, was fully executed by the
“ deed-poll of 1687; and that the farther power in
“ the indenture of 1684, to revoke any new appoint-
“ ment of uses, was void in its creation as to such
“ uses as should afterwards be duly limited, unless a
“ power of revocation should be again expressly re-
“ served, which was not in this case; and, conse-
“ quently, that the uses limited by the deed-poll of
“ 1687, were not revoked or annulled by the inden-
“ ture of 1704.”

The Lord Chancellor concurring in this opinion, decreed accordingly.

Printed Ca.
Dom. Proc.
1717.
Adams v.
Adams,
Cowp. R.
651.

On an appeal to the House of Lords, the decree was affirmed with the concurrence of all the Judges.

§ 21. But

§ 21. But where a power is collateral to the land, the person to whom it is given cannot, upon the execution of it, reserve to himself a new power of revocation.

Exception—
Powers col-
lateral.

§ 22. Sir George Crooke having three daughters only, directed, by his will, that his lands should descend and go amongst his daughters in such shares and proportions as his wife by deed should direct and appoint. The wife made an appointment in pursuance of the power, in which, she reserved to herself a power of revocation.

Wall v.
Thurborne,
1 Vern. 355.

The court said, that as to the power of revocation, the case might be eased of that, for it was only an authority in the wife, and that being once executed, she could not reserve such power to herself.

§ 23. Powers of revocation and appointment may not only be reserved to all those who are capable of disposing of lands and tenements, but also to some persons who have not by the common law a disposing power: for, whenever a person to whom a power is given, executes it, the appointee under the power does not derive any interest from the person who executes the power, he being considered as a mere instrument, to carry into execution the intent of the person who created the power; but is in immediately by and under the instrument by which the power was created.

To whom
Powers may
be given.

§ 24. A power may be given to an infant, but it must be expressly inserted in the deed, that the infant may

Infants.
Vide 2 P. W
229. 671.

may execute such power during his infancy; for an infant cannot execute a power given generally.

Hearle v.
Greenbank,
1 Vesey 298.
3 Atk. 695.

§ 25. A man devised all his real estates to trustees and their heirs, for the sole and proper use of his daughter during her life, and to be at her disposal, and not subject to the debts or contracts of her husband; and to permit her by deed or writing executed by three witnesses, notwithstanding her coverture, to give and dispose of his said freehold estate, as she should think proper. The daughter being about seventeen, made her will pursuant to the power, and thereby disposed of the estate. The question was, whether this execution of the power was not void, on account of the infancy of the daughter.

Lord *Hardwicke* said, this was a question of consequence, and never determined that he had heard: that he could find no case where a power given generally, could be executed by an infant, where an interest passed from the infant, and, therefore, that he would make none. His Lordship, however, observed, that if the power had been given, notwithstanding her infancy, the execution of it would have been good.

Married
Women.
Ante ch. 2.
f. 22.

§ 26. By the common law, a power or authority given to a woman was not suspended by her marriage, because the execution of such a power or authority was considered as a ministerial act, in the doing of which, the person who exercised it had no interest.

When

When powers of revocation and appointment were introduced, the Judges reasoned by analogy from these principles, and determined, that coverture did not create an incapacity in a woman to execute a power.

§ 27. A person settled lands on himself for life, remainder to his wife for life, remainder to the issue of the marriage, with a proviso, that it should be lawful for his wife, during her life, to demise the premises under certain conditions. After the husband's death, the wife married again; and she and her husband demised the lands pursuant to the power.

Bayley v.
Warburton,
Com. Rep.
494.

It was held, in the Exchequer, that this was a good execution of the power, notwithstanding the coverture; for the estate of the lessee was not derived from the lessor, but arose out of the estate of the feoffees, or releasees in the original settlement.

§ 28. If, however, a power be expressly reserved to a woman, to be executed by her, being sole, a subsequent marriage will, in that case, suspend the exercise of the power.

§ 29. An unmarried woman settled her estate on herself for life, remainder over, reserving to herself a power, *being sole*, to make leases for three lives; she afterwards married, and executed the power jointly with her husband. This execution was held not to be pursuant to her power, for, by the marriage, she became subject to her husband: and the Lord Keeper took a diversity between a naked power, and a power that

Antrim v.
Becks, 1 Ab.
Eq. 343.

that flows from an interest ; for, where a bare power is given to a feme by will, to sell lands, although she afterwards marries, she may sell the lands, even to her husband : but, where a woman, upon a settlement of her own estate, reserves a power which flows from an interest, that power ought to be executed by the woman whilst sole ; and yet, he said, such powers ought to be taken liberally, though, formerly, they were taken strictly.

It is now usually inserted in the deed by which the power is created, that a woman shall be enabled to execute it, whether she be sole or married.

§ 30. The proper mode of creating a power of this kind, is to convey the lands to trustees, to the separate use of the wife, remainder to such persons and for such estates, as she shall by any deed or writing under her hand, notwithstanding her coverture, direct or appoint : but although no such conveyance be made, and articles only are entered into previous to a marriage, by which it is agreed, that the wife shall have a power to dispose of any estate which may descend to her, it will be sufficient, and a court of equity will support such a power.

Wright v.
Ld. Cadogan,
6 Brown's
Ca. in Parl.
156. Amb.
R. 468.

§ 31. By articles before marriage the intended husband covenanted, that he would execute all such acts and conveyances as should be necessary for vesting any estate which should descend to his wife, in such persons as his wife should appoint, in trust for her sole and separate use ; and to be subject to such disposition

as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife became entitled to the trust of some lands, which she devised by her will duly attested. It was decreed by Lord Chancellor *Northington* that the power was well created, and that the will of the wife was a good execution of it.

On an appeal to the House of Lords, it was contended on the part of the appellant, that the proper and only methods of enabling a feme covert to dispose of her inheritance by deed or will, operating as an appointment, were, either by a conveyance to uses or trusts before marriage, reserving such a power, or else by fine levied by the husband and wife after the marriage, with a deed to lead the uses of it, reserving such a power to her, over the inheritance vested in the cognizees. But unless one of these methods was taken her will of real estates would be void, as an instrument of conveyance, and could not bind her heirs. Marriage articles being entered into for a valuable consideration, would bind the husband to do all proper acts for enabling his wife to make an effectual disposition of her real estate, notwithstanding her coverture: but when those acts had not been done, the heirs of the wife would be entitled to take advantage of all defects in the will, or in the capacity of the testatrix; just as they would have been entitled to claim by descent, in case, after a power duly reserved to her over a use or a trust, she had not thought fit to make any appointment, in execution of that power.

On

On the other side it was argued in support of the power, that the legal estate was outstanding in trustees, and therefore no formal conveyance of it was by any means necessary, as such conveyance could not affect the legal estate or have any legal operation. It could amount only to a direction to the trustees, to become trustees for such persons, intents and purposes, as the wife should by will or deed appoint; and as the interest of the wife was only equitable, the general agreement and intention of the parties, clearly and indubitably expressed in the articles, were as strong and binding as an equitable conveyance, and did in effect amount to a direction to the trustees and their heirs, to stand seised of the premises, in trust for such person and persons as she should appoint, and in the mean time for her separate use, exclusive of her intended husband; and especially as the husband by the articles actually covenanted to do all necessary acts to enable his wife to make any such disposition or appointment of her estate as she should think fit, either by deed or will; by which covenant he was bound in equity to do all necessary acts for authenticating and establishing any deed or will which she should make. The decree was affirmed.

Vide Doe v.
Staple,
2 Term Rep.
684.

Goodill v.
Brigham,
1 Bos. & Pull.
R. 192.

§ 32. In a modern case, where a person devised a farm to his sister, *Esther Rogers*, her heirs and assigns, for ever, and declared that his will further was, that the estate thereby given to his sister, should be fully vested in her, notwithstanding her coverture, and that she might give, sell, and dispose of the same, as she should think proper. The Court of Common Pleas held

held that the power was void, as being inconsistent with the fee given to the devisee in the first instance; and that she could not convey without a fine.

It is observable that this was not a power given by means of a conveyance to uses, and that the authority of this case has been questioned.

Vide Cox v. Chamberlain, infra ch. 16.

§ 33. All persons capable of taking lands by any common law conveyance, may be appointees. And a married woman may take by appointment from her husband, because she does not take immediately from him, but from the releasees to uses in the deed, by which the power is created.

Who may be Appointees. 1 Inst. 3 a. n. 1.

§ 34. It frequently happens that estates are subject to a power of appointment in the first taker, with remainders over in default of such appointment, upon which an opinion has obtained in some instances, that such a power suspended the effect of the subsequent limitations, and kept them in contingency, instead of their vesting, subject to be divested by a subsequent execution of the power. But this doctrine has been altered by the following cases.

A Power of Appointment does not suspend the vesting of Remainders. Tit. 16. ch. 1. s. 57. Fearn v. Cont, Rem. 343.

§ 35. By marriage articles, money was agreed to be laid out in the purchase of lands, to the use of the husband for life, remainder to trustees during his life, to preserve, &c.; then to the wife for life; then to all and every the child or children to be begotten by the husband on her body, for such estate, &c. proportion, &c. as the husband and wife during their

Cunningham v. Moody, 1 Ves. 174.

joint lives, by any writing under their hands and seals attested, &c., should appoint: in default of a joint appointment, then as the survivor should appoint; and, in default of appointment, to be equally divided among the children, if more than one, as tenants in common, with cross remainders and benefit of survivorship; if but one, then to the child in tail; in default of such issue, to the husband, his heirs and assigns, for ever.

Upon a question, whether the inheritance in the lands to be purchased would have vested in the father, it was contended it could not; because, during his whole life, the inheritance, supposing a purchase made, would have been in abeyance: for, as he might have limited it to any child in fee, and the provision over in default of appointment would then have been out of the question, it was a springing use, resting in suspense during his life, for which Lord *Conway's* case was referred to.

But Lord *Hardwicke* held, that, the father taking an estate for life by the same settlement, the inheritance would have vested in him. He said, that, where no person was seen or known, in whom the inheritance could vest, it might be in abeyance; that the fees being in abeyance, had, in some cases, occasioned an act of parliament to remedy it; but there it was not so: nor did the power of appointment make any alteration therein: for the whole effect thereof was, that the fee, which was vested, was thereby subject to be divested, if the whole was appointed;

pointed ; or, if part, so much as was not drawn out of the inheritance still remained in the father, as part of the old fee ; and there was no occasion to put the inheritance in abeyance, which the court never did but from necessity ; and would so mould it by opening the estate, as in *Lewis Bowle's* case, and in several others, as best to answer the purposes of the limitations: but, if the appointment was not made, it remained undisturbed.

It is to be observed, that this was not a case, in which the estate was originally the father's, or vested in him at all before the settlement ; where the limitation of the fee to him, being the reversion, and part of his old estate, would have remained vested in him, till divested by the vesting of a contingent remainder. But it was the case of money, to be laid out in lands, where the father's title to the inheritance was to originate in the same settlement as the limitations to the children ; and by which (as Lord *Hardwicke* observed), as the father took also an estate for life, the inheritance, according to the ordinary rules, vested in him.

§ 36. By marriage settlement, lands were limited to the use of the wife and her heirs, till the marriage, afterwards to her separate use for life ; remainder to the use of her husband for life ; remainder to the use of all and every the child or children of the marriage, or such of them, for such intents and estates, &c. and in such parts, shares, and proportions, as the husband and wife should by deed appoint ; and, for want of

Doe v.
Martin,
4 Term R.
29.

such appointment, then to the use of the child or children of the marriage, in such parts, shares, and proportions, and for such estates and interests, as the survivor of them should by deed or will appoint ; and, for want of such appointment, then to the use of all and every the child or children, equally, share and share alike.

Upon a question, whether the remainders to the children were vested or contingent, it was contended, that the power of appointment prevented their vesting, by absorbing the whole fee ; and the cases of *Leonard, Lovie, Loddington v. Kyme*, and *Lord Conway*, were cited in support of this conclusion.

Lord *Kenyon*, after observing that the judgment must depend on the authorities cited, the three leading of which were, *Lovie's case, Walpole v. Lord Conway*, and *Cunningham v. Moody*, and noticing the opinions in the two last, was happy to find, that, in the last of these cases (*Cunningham v. Moody*), where Lord *Hardwicke* had an opportunity of re-considering this question more fully, and at a time of life when his judgment was more mature, he determined differently from the the opinions held in the two former. His lordship said, he could not find any substantial distinction between that case and the principal one. That the limitations to the children were first subject to a power of appointment to the children, &c. : and, whether the limitations preceded or followed the power of appointment, it made no difference. That the opinion of Lord *Hardwicke* in the latter case was peculiarly

peculiarly deserving of attention; because, when it was discussed, the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him; and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers that ever attended the bar of that court. Lord *Kenyon* therefore thought, that, on the authority of that case, the remainders to the children were vested, subject, nevertheless, to be divested by the parents executing the power.

Mr. Justice *Buller* cited the case put by Mr. J. *Powel*, 2 *Ld. Raym.* 1158., of a limitation to such persons as *A.* should appoint by will, remainder over, in support of the same conclusion, and judgment was given accordingly.

TITLE XXXII.

D E E D.

CHAP. XVI.

Of the Execution of Powers.

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| <p>§ 1. <i>May be restrained by Circumstances.</i></p> <p>10. <i>Where the particular Instrument is specified it must be adopted</i></p> <p>12. <i>A Power given generally, may be executed either by Deed or Will.</i></p> <p>15. <i>But they must be properly executed.</i></p> <p>17. <i>Exception.</i></p> <p>20. <i>A Will made in Execution of a Power restrains all its Properties.</i></p> <p>23. <i>The Power need not be recited.</i></p> <p>27. <i>But the Instrument must refer to the Estate.</i></p> <p>29. <i>A Power may be executed by several Instruments.</i></p> | <p>31. <i>And at different Times.</i></p> <p>34. <i>An Appointment may only be a Revocation, pro tanto.</i></p> <p>37. <i>An Appointment may give a lesser Estate.</i></p> <p>41. <i>An Appointment must not be illusory.</i></p> <p>48. <i>A Condition annexed to an Appointment is void.</i></p> <p>50. <i>An Appointment to Persons not Objects of the Power is void.</i></p> <p>55. <i>A Power cannot be delegated.</i></p> <p>57. <i>Unless there are special Words.</i></p> <p>59. <i>In what Cases an Instrument operates as an Appointment.</i></p> <p>61. <i>Effects of the Execution of a Power.</i></p> <p>68. <i>Will not Defeat a prior Estate,</i></p> |
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Section I.

May be restrained by Circumstances.

POWERS of revocation and appointment were formerly directed to be executed by the tender of a ring, the payment of a sum of money, &c. But in modern times they have in general been directed to be executed by deed or instrument in writing, or by will.

§ 2. The execution of powers of revocation and appointment may be restrained by such collateral circumstances,

circumstances, and directed to be done by such instruments, attended with such forms and ceremonies, as the persons creating the power may think proper. Nor can a court of law dispense with the performance of those ceremonies without violating the intention of the parties.

This rule is the same, though the power be reserved to the original owner of the estate; for where a man debars himself from making any future disposition of his property, except by an act attended with certain forms, no court of law can dispense with the observance of those forms; because a man may feel conscious of such weakness or frailty of mind, as to require that all future dispositions made by him, should be attended with such forms and solemnities, as may effectually prevent surprise and imposition.

3 Cha. Ca.
55. 107.

§ 3. It has therefore been established at law, as a general rule, ever since the introduction of powers, that all the forms and circumstances prescribed by the deed, by which the power is created, must be strictly observed; otherwise no revocation or new appointment will take place.

10 Rep. 144 c.

§ 4. Thus, where the execution of a power of revocation and appointment was directed to be by *deed indented to be inrolled*; it was resolved, that these circumstances must be complied with, for if the deed were allowed to operate as a revocation before inrollment, then it never would be inrolled. It was also resolved in the same case, that where the deed was

Diggs's Case,
1 Rep. 173.

directed to be inrolled in a particular court; it must be inrolled in that court.

Hawkins v.
Kemp,
3 East. R.
410.

§ 5. A husband who was tenant for life had a power of revocation, by any deed or instrument in writing, to be executed by him in the presence of and attested by three or more credible witnesses; and to be inrolled in one of his Majesty's courts of record, at *Westminster*, by and with the consent and approbation, in writing, of nine persons, or the survivors or survivor of them, but not otherwise.

One of the nine persons, whose consent was necessary, gave a power of attorney to the husband, authorizing him to consent to any revocation he should think proper to make, and to execute any deed or instrument necessary for that purpose.

By a deed poll, executed by the husband in his own character, and also as attorney to one of the trustees under the power mentioned, he revoked the uses; and this deed was inrolled. Seven years after, the husband by an indenture, reciting the deed of revocation, and that, it being executed by the husband as the attorney of one of the persons whose consent was necessary, upon that account doubts were entertained of its validity, as a revocation, revoked the uses with the consent of all the parties required; but this deed was not inrolled in the lifetime of the husband.

The court resolved, that the first deed was not a good revocation; because the consent of one of the persons,

persons, whose consent was necessary, was not sufficiently given by the execution of the deed by the husband, as his attorney; because, if such a mode of signifying a consent was held sufficient, it would be a total destruction of the check intended, by requiring the personal approbation of a third person; and that the second deed was not sufficient, because it was not inrolled; and that the inrolment of the first deed could not be transferred to the second, for every thing, required to be done in the execution of such a power, ought to be strictly performed.

§ 6. Where a person reserved to himself a power of revocation by any deed or writing, to be executed in the presence of six witnesses, whereof three should be peers; a will executed before three witnesses, was held not to be an execution of the power.

§ 7. The Duke of *Albemarle* made his will in 1675, and thereby gave a great part of his estate to the Earl of *Bath*. In 1681, he made a deed of settlement, whereby, though he varied in several particulars from his will, yet he limited the greatest part of his estate to Lord *Bath*. In this settlement the Duke reserved to himself a power of revocation, by any deed in writing, to be executed by him, in the presence of six or more credible witnesses, three whereof to be peers of the realm.

Bath &
Montague's
Case,
3 Cha. Ca. 55.
2 Freem. 193.

In 1688, the Duke made another will, attested by three witnesses only, whereby he revoked this settlement,

ment, and gave a great part of his estate to Mr. *Monk*. Mr. *Monk*, upon the Duke's death, brought a bill in Chancery to set aside the settlement, and establish the will; and it was insisted on his behalf, that although the will might not in strictness of law, be a revocation of the deed of settlement, the circumstances required not having been pursued, either in the number or quality of the witnesses, yet as it was made with great deliberation, it being in proof that the draft was not completed until six months after instructions had been given for preparing it, and that Lord Chief Justice *Pollexfen*'s opinion was taken upon it, it ought to be deemed an effectual revocation in equity, although the circumstances required had not been strictly pursued; as they were only prescribed to prevent surprise, and it was evident there was none in this case.

But it was held by Lord Keeper *Somers*, the two Chief Justices *Holt* and *Treby*, and Baron *Powell*, that the latter will was no revocation of the former settlement, either at law or in equity: for in all cases of revocations, merely voluntary, all the circumstances required by the deed creating the power, must be strictly pursued; and there was no precedent of any case in equity in which the court had given any aid, where both parties were volunteers.

§ 8. Where a power of revocation was given to be executed by will, under hand and seal; a will not sealed was held not to be a revocation.

§ 9. Husband

§ 9. Husband and wife settled the wife's estate to the use of themselves for their lives, remainder to their first and other sons, in tail male; with a power to the husband at any time during the joint lives of himself and his wife—"By his last will, or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses (if he should die before his wife without any issue between them then living) to charge the premises with any sum or sums of money, not exceeding 2000 l., to be paid to such persons, and in such proportions as he should appoint."

Dormer v. Thurland,
2 P. Wms.
506.

There was no issue of the marriage, and the husband by his last will, in writing under his hand, attested by three witnesses, but not sealed, reciting his power of charging the premises with 2000 l., disposed of the same among his own relations.

One of the questions in this case was, whether this will, not being sealed, was a good appointment of the 2000 l., within the power,

Lord Chancellor *King* was of opinion, that the will being duly executed, was a good appointment: but directed for the satisfaction of the parties, as it was a matter of law, that it should be referred to the judges of the King's Bench. And it was by them determined, that the will was void as a charge, for want of being sealed.

The opinion of the Lord Chancellor, in this case, was founded on an idea that the words, *under his*

hand and seal, referred only to the sentence immediately preceding, viz. *or any writing purporting to be his last will*, and not to the words, *by his last will*, so that the power might be executed, either by a will duly attested, according to the statute of frauds, which does not require a seal, or else by a writing purporting to be a will, under his hand and seal. But the Court of King's Bench was of opinion, that the words under *hand and seal*, referred to both the preceding sentences. And this construction has been adopted by Lord *Hardwicke* in a similar case, respecting personal property.

Rose v. Ewer,
2 Atk. 156.
Vide
Spranger v.
Barnard,
3 Bro. Rep.
585.

Where the
particular In-
strument is
specified, it
must be
adopted.

§ 10. If the nature of the instrument by which a power is directed to be executed, be specified, it must be adopted: and therefore a power to revoke by deed, cannot be executed by will.

Darlington v.
Pulteney,
Cowp. Rep.
260.

§ 11. The Earl of *Bath* and Lord *Pulteney* his eldest son, joined in suffering recoveries, and declared the uses thereof, to such persons, as Lord *Bath* and Lord *Pulteney*, by any deed or deeds, sealed and delivered by them in the presence of two or more credible witnesses, should jointly appoint. And in case of the death of either of them, then as the survivor of them, by any deed or deeds to be executed as aforesaid, should appoint. Lord *Bath* having survived his son, made his will duly executed, and sealed, and thereby devised a piece of ground comprised in one of the recoveries. And the question was, whether this will should operate as an execution of the power.

A case having been sent by the Court of Chancery to the Court of King's Bench on this point,

Lord *Mansfield* said, the first requisite which the power prescribed was impossible to be performed by will, which was, that it should be by joint deed of Lord *Bath* and his son. It was true the survivor had the same power, but then it was emphatically reserved to be executed by deed. Now the word deed, in the understanding of the law, had a technical signification to which a will was in no respect applicable. If any words had been thrown in, such as writing, instrument, or other term of a general comprehensive meaning, it might have been fair to have taken advantage of it, in favour of the intention; but there being no general words, nor any meritorious consideration, it was impossible to say, that a will was a deed, within the terms of this power.

The Court of King's Bench certified that the power was not duly executed by this will.

Cavan v. Pulteney,
6 Bro. Par.
Ca. 175.

§ 12. Although the courts of law have never deviated from the principle, that all the circumstances required by the person who creates the power, should be strictly pursued; yet in other respects, they have proceeded with sufficient liberality in supporting revocations. Thus, if a power be given generally, without any restrictions, as to the nature of the instrument by which it is to be executed; or if words of a general nature only, such as writing or instrument be inserted, it may in such case be executed, either by a deed, or by a will.

A Power given generally may be executed either by Deed or by Will.

Kibbett v.
Lee,
Hob. 312.

§ 13. A person covenanted to stand seised to the use of himself for life, remainder to his eldest son, and the heirs of his body; reserving to himself a power “by writing, under his hand and seal, and by him delivered in the presence of three credible witnesses,” to revoke the uses.

Afterwards the covenantor made his will, in writing, under his hand and seal, delivered in the presence of four witnesses, and thereby devised the lands comprised in the deed of covenant to his youngest son.

It was resolved, that this will being a writing, signed, sealed, and delivered in the presence of three credible witnesses, was a good revocation and appointment.

Roscommon
v. Fowke,
6 Bro. Parl.
Ca. 158.

§ 14. A power was given to a woman, by any writing, under her hand and seal, attested by two or more credible witnesses, to revoke certain uses, and by the same or any other deed to limit new ones. She by will, under hand and seal, attested by three witnesses, devised the lands comprised in the power.

It was determined by the Court of Common Pleas, in *Ireland*, and by the House of Lords of *England*, that this was a good execution of the power, the word “writing” being applicable to a will.

But they
must be
properly
executed,
1 P. Wms.
741.

§ 15. Where a power is given generally to revoke uses, and appoint new ones; or where a power is expressly given by deed or will, without prescribing the manner in which either of them is to be executed, the instrument

instrument is intended in law to be such a one as is proper for the disposition of that, which is the subject matter of the power. From which it follows, that a deed made in execution of a power must be sealed, and a will must be executed according to the statute of frauds and perjuries.

§ 16. Lands were conveyed to trustees and their heirs, to the use of them and their heirs, in trust (after a sum of money should be raised) to convey them to J. S. and his heirs, or to such person or persons, as he or they should appoint. J. S. by a will, attested by two witnesses only, devised the lands; it was contended that the will should operate as an appointment: the Lord Chancellor, however, decreed that it could not be deemed an appointment, because it was not executed according to the forms prescribed by the statute of frauds and perjuries.

Wagstaff v. Wagstaff,
3. P. Wms.
258.

§ 17. But where no interest passes from the person who executes the power, directed to be executed by will, and he is merely to apportion that which another person has given; in such a case, as he is not the person who makes the charge, or affects the estate, it is not necessary that such a will should be executed according to the statute of frauds.

Exception.

§ 18. *Thomas Clough* being tenant for life, under a marriage settlement, with remainder to his first and other sons in tail, and having two sons *John* and *Thomas*, who were of age, they entered into articles, reciting the settlement, and that there was no provision for

Jones v. Clough,
2 Vez. 365.

It was resolved, that as *Clement Harwood* had not a power of devising the third acre under the statute of wills, it being held *in capite*, his will should operate as an appointment under his power, for, otherwise, it would have no effect whatever.

Scrope's Case,
10 Rep. 143.

§ 25. *Nicholas Scrope* reserved to himself a power of revocation, by writing indented under his hand and seal, subscribed in the presence of three witnesses; afterwards, he covenanted to stand seised of the same lands to other uses. It was resolved in the court of wards, by the two Chief Justices and the Chief Baron, that although there was no express declaration of any intention to revoke the former uses, yet that this conveyance should enure, first, as a revocation of the former uses, and 'secondly, as a declaration of new uses; *quia non refert an quis intentionem suam declaret verbis, an rebus ipsis et factis*; and when *Scrope* limited new uses, he thereby signified his purpose to revoke the former ones.

Guy v. Dormer,
T. Raymond 295.

§ 26. *William Dormer* conveyed his estate to trustees, to certain uses, with a proviso, that if he should, by any writing executed in the presence of two or more witnesses, in express words, signify and declare his intention to revoke or make void that deed, the uses should cease. *William Dormer* afterwards made his will in writing, signed and sealed in the presence of two witnesses, by which he gave and devised the lands to different persons from those to whom they were limited by the deed. It was determined, that the power of revocation was well executed.

Deg v. Deg,
2 P. Wms. 414.

§ 27. The instrument by which a power is executed, must, however, have some reference to, or must mention the estate on which it is intended to operate, otherwise it will not be considered as a revocation or appointment. But it will be sufficient that the estate subjected to the power, be referred to in terms which include it with the other property of the appointor, although it be not particularized.

But the Instrument must refer to the Estate.

§ 28. A person having a power to charge an estate with 2,000 l. after the death of his wife, and a term of years being created for that purpose, he made a will, beginning with these words, “ I charge all my real “ estate.”

Probert v. Morgan,
1 Atk. 441.

It was held by Lord *Hardwicke*, that if a man had a power to charge an estate, it was not necessary, in the execution of it, that he should refer to the deed out of which the power arose, for, in a court of equity, it was enough that his intent appeared; and if, in the execution, he sufficiently described the estate he had a power to charge, it would be bound, especially where the person charging was a purchaser of the power: and his Lordship held, that the power was well executed.

Vide 1 Atk.
559.

§ 29. Although a power of appointment be directed to be executed by any deed or writing, yet it may be executed by several acts and assurances, provided they have such a relation to each other, that they can be considered as making together but one assurance.

A Power may be executed by several Instruments.

Herring v.
Brown,
2 Show. 185.
1 Vent. 368.

§ 30. Sir *James Williams* being seised in fee, made a voluntary settlement, to the use of himself for life, remainder to his brother in tail, reserving to himself a power of revocation, by deed indented and signed by two or more witnesses. Some time after, Sir *J. Williams* levied a fine, and, by a deed made between him, his brother, and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the said fine, the agreement of all the parties was, that it should enure to the use of Sir *J. Williams* and his heirs.

2 Burr. R.
704.
Doug. Rep.
45.

It was determined in the Exchequer Chamber by six Judges against two, that this fine and declaration of uses were to be considered as one and the same conveyance, and operated as an execution of the power.

And at dif-
ferent Times.

§ 31. Powers of revocation and appointment may be executed at different times, over different parts of the estates which are subject to the power.

Digge's Case,
1 Rep. 173.

§ 32. *Christopher Digges*, in consideration of his marriage, covenanted to stand seised to the use of himself for life, remainder to the use of his son in tail, &c. with a proviso, that it should be lawful for him to revoke any of the uses or estates, and to limit new uses. *Christopher Digges* revoked the uses of part of the land, and afterwards revoked the uses of another part. It was resolved, that he might revoke part at one time, and part at another, and so of the residue, until he had revoked all.

Sir R. Lee's
Case, 1 And.
67. S. P.

§ 33. A power was given by will to a person, “ from
“ time to time, by deed or deeds, writing or writings,
“ to limit or appoint to the use of any woman or wo-
“ men, for and in lieu of jointure, all or any part of
“ the land,” &c. The devisee, on his marriage, ap-
pointed part of the premises to the use of his wife,
pursuant to his power.

Zouch v. Woolton,
2 Burr. R.
1136. 1 Bla.
Rep. 281.

Afterwards the devisee, by another deed, reciting
that he had got an additional portion by his wife, in
consideration thereof, and as an additional jointure,
appointed another part of the premises to the use of his
wife. The question was, whether the devisee had not
completely exhausted his power by the first appoint-
ment, or whether he had still sufficient power to make
the second appointment.

It was unanimously resolved, that the power was not
exhausted by the first appointment, and, therefore,
that the second appointment was good.

*Doe v. Mil-
borne*,
2 Term Rep.
721. S. P.

§ 34. An appointment may, in some instances, have
a partial operation, and only operate as a revocation
pro tanto. Upon this principle, it has been held, that
where a person having a power of revocation and ap-
pointment, mortgages the lands, such mortgage only
operates as a revocation *pro tanto*, because, in equity,
the mortgagor still continues owner of the estate, a
mortgage being considered as a pledge only for the
money.

An Appoint-
ment may
only be a re-
vocation *pro
tanto*.

Perkins v. Walker,
1 Vern. 97.
Id. 141. 182.

§ 35. But where a mortgage is made by the execu-
tion of a power, and there is also a complete disposi-

tion of the equity of redemption, there the revocation will be complete,

Fitzgerald v.
Fauconberg,
Fitzg. Rep.
207.
6 Bro. Parl.
Ca. 295.

§ 36. A person who had a power of revocation and appointment, conveyed the estate to trustees and their heirs, upon trust out of the rents and profits of the premises, or by mortgage, &c. to raise so much money as should be sufficient to pay all the debts mentioned in a schedule thereunto annexed, and, after payment thereof, that they should pay the overplus (if any) and reconvey such part of the premises as should remain unsold, to the grantor, or to such persons, uses, and estates, as he should appoint.

It was determined, that this deed operated as a complete revocation of the uses, and not as a revocation *pro tanto*.

An Appointment may give a lesser Estate.

§ 37. The execution of a power will be good, although it limits a lesser estate than that which the appointor was enabled to limit.

Rattle v.
Popham,
2 Stra. 992.
2 Burr. 1147.

§ 38. A tenant for life having a power to limit the lands to any woman he should marry, for her life, by way of jointure, and in bar of dower, made a lease for 99 years, determinable on the death of his wife, by way of a jointure for her.

It was held, on a special verdict in ejectment, that this was not a good execution of the power at law, for the estates were totally different, one being a freehold, the other a chattel.

But

But Lord Chancellor *Talbot* held it to be warranted by the power, saying, that it was not a defective, but a blundering execution of the power. 2 Vesey 644.

§ 39. *J. S.* having four children, two sons and two daughters, settled his estate to the use of himself for life, remainder to his wife for life, and, after their decease, to the use of such child and children, and in such shares and proportions as he should appoint. *J. S.*, by his will, devised a rent-charge out of those lands to his youngest son for life, remainder to the first and other sons of his body; and if he died without issue, so as the estate should come to his eldest son, then he to pay 500 *l.* a piece to his daughters. The eldest son insisted, that the power was not well pursued, as the testator might have distributed the lands among his children, but had not power to devise a rent-charge, or sums of money. But the court held the appointment to be good.

Thwaytes v. Dye, 2 Vern. 80 Vide *Roberts v. Dixall*, 2 Ab. Eq. 668.

§ 40. In a modern case, it was held, that a power of appointing a real estate, was well executed by a devise to trustees to sell, and an appointment of the money to arise from the sale.

Kenworthy v. Bate, 6 Ves. Jun. 792. *Long v. Long*, 5 Ves. Jun. 445.

§ 41. Where a person has a power of appointing an estate, or a sum of money, *unto and among* his children, in such shares and proportions as he shall think proper; the appointor must give the whole among the children, and every child must have such a fair and reasonable share as is not illusory.

An Appointment must not be illusory.

Pawlet v. Pawlet, 1 Will. R. 224.

Menzey v.
Walker,
Forrest 72.

§ 42. The trust of a term of 300 years was declared to be for raising such sums of money for the portions of the children of a marriage (except an eldest or only son) in such manner, and at such time, and under such limitations, as the husband should by will or deed appoint, so as such sum or sums did not, in the whole, amount to above 2,000 *l.* There were three younger children, and the husband by his will, reciting that his two daughters were amply provided for by their grandfather, appointed the whole of the sum to his second son.

It was decreed, that the execution of the power was void.

Pocklington v.
Bayne, 1 Bro.
Ca. in Chan.
450.

§ 43. Lands were limited “ to *Samuel Pocklington*
“ for life, remainder to his wife for life, remainder to
“ the use of all and every the child and children of the
“ said *S. P.*, &c. in such parts, shares, and propor-
“ tions, and for such estate and estates, not exceeding
“ an estate or estates tail, with or without power of
“ revocation, and by, with, and under such powers,
“ provisoes, remainders, or limitations, over to some
“ or one of the said children, as the said *S. P.* should
“ by any deed or writing, or by will, direct or ap-
“ point; and for default of such appointment, then
“ to all and every the children, to be divided share
“ and share alike.”

S. P., by will duly attested, reciting the power, did, in pursuance thereof, limit one acre of the premises to his eldest son, and his daughter, for their lives, and the

the life of the survivor of them, with remainder to such person or persons as should be entitled to the residue of the said premises, and then limited the residue to his second son *Henry*, in strict settlement.

Lord *Thurlow* was clearly of opinion, that the execution of the power was totally illusory, and contrary to its nature ; that, therefore, the estate must go among all the children, agreeable to the direction, in default of execution of the power.

§ 44. If, however, it appears from the words of the power, to have been the intention of the parties, that the donee should give the whole of the property to any one of the children, or persons intended to be benefited, an appointment to one will be good.

Thomas v. Thomas,
2 Vern. 513.

§ 45. The trust of a term was declared, that if *Robert Austin* should die leaving issue by his wife, a son and other children, then to raise a sum not exceeding 1,500 *l.* for the sole benefit and advantage of such child or children, (other than the eldest), in such proportions, manner, and form, in all respects, as the said *R. A.* should for such purpose, by his last will in writing direct, limit, or appoint ; and in default of such direction, then to the sole benefit of such child, if but one, and if more, (other than an eldest), to them all equally.

Austin v. Austin,
2 Ab. Eq. 667.

R. A., by his will, directed the money to be raised, and appointed 450 *l.* to *Robert*, one of the younger sons, and 1,050 *l.* to his daughter ; but gave nothing to

to

to *Edward*, another younger son, who brought his bill to be let in to a share of the 1,500*l.* But it appearing that he was otherwise provided for, and because there was a discretionary power in the father, which he had exercised in a reasonable manner, the bill, after long consideration, was dismissed.

Swift v.
Gregson,
1 Term R.
432.

§ 46. Lands were limited in a marriage settlement, to the use of *John Gregson* for life, remainder “to and
“for the use and behoof of such child and children
“of the said *J. G.*, &c. and for such estate and estates,
“intents and purposes, as the said *J. G.* should ap-
“point, and, for want of such appointment, to the
“use of all and every the child and children of the
“said *J. G.*, &c. equally, share and share alike.”

John Gregson, by deed reciting the settlement, and that he had two children, *Rain Gregson* and *Mary Huntley*, appointed, that the premises should, after his decease, go to the use of the said *Rain Gregson* and the heirs of his body, remainder to the said *Mary Huntley* and her heirs. *Mary Huntley* brought an ejectment for the recovery of an undivided moiety of the estate, upon the ground, that the appointment was illusive and void.

Mr. Justice *Buller* said, the words of the power were,
“to and for the use and behoof of such child and
“children, and for such estate and estates,” &c. The argument for the plaintiff was, first, that where there is a power to give an estate, to and amongst all and every the children, each must have a beneficial part;
and,

and, secondly, that these words were tantamount to those.

His objection was to the minor proposition; these words were not like those assumed; there were no such words in this power, as, “to and amongst,” but just the reverse, for it was a power to appoint to the use and behoof of such child and children; therefore, instead of including all, it says, that the appointor may appoint to one only.

The plaintiff’s counsel admitted, that, under a power of appointing *to such of my children*, an appointment to one only would be good, but the present words were stronger. An appointment to one, under a power of appointing *to such child and children*, was good, because it includes one. He cited the case of *Spring v. Biles*, Mich. 24 Geo. 3. B. R., where a power was given to dispose of lands, “to and amongst such of my relations as shall be living at the time of my decease, in such parts, shares, and proportions, as my wife shall think proper.” And it was determined, that an appointment of the whole estate to one of the relations was good,

He observed, that that case, with the difference only of *relations* instead of *children*, was stronger than the present. There the power was, “to and amongst such of my relations, &c. in such parts, shares, and proportions,” &c. which imported that a division was intended: but, in the present case, the words “parts, shares, and proportions,” were not used, and there
was

Kenworthy
v. Bate, 6 Ves.
Jun. 793.

was no evidence of an intention that it should be divided into shares. In that case, the court said, they had not a particle of doubt, but that the word *such* meant one or more. Here, therefore, it must have the same construction. It must mean, that the appointor should appoint to one or more.

Judgment for the defendant.

1 Ves. Jun.
299.
2 Ves. 336.

§ 47. It has been determined in some modern cases respecting personal property, that an illusory appointment may be accounted for by circumstances; and, therefore, where a person having a power of appointment among his children, and having advanced one of his daughters in marriage, recited that as a reason for giving her a small share. It was held not to be illusory.

4 Ves. Jun.
785.
Vide 5 Ves.
Jun. 859.

In a subsequent case, it was said, that, in equity, an appointment of a very small share was not illusory, if justified by circumstances; as, where that object was otherwise provided for.

A Condition
annexed to
an Appoint-
ment is void.
2 Vesey 644.
Pawlet v.
Pawlet,
1 Will. R.
224.

§ 48. A condition annexed to an appointment, where the power does not warrant such condition, will be deemed void. So that, if a father, having a power to appoint a sum of money among his children, qualifies his appointment to one of them, with a condition, that he shall release a debt or pay a sum of money, the appointment will be absolute, and the condition void.

§ 49. The

§ 49. The principle upon which this doctrine is founded, is, that where there is a complete execution of a power, and something *ex abundanti* is added, which is not warranted by the power, there, if the excess be distinguishable, so that the court can draw a line, the execution will be good, and the excess only will be void. But if the boundary between the execution and the excess cannot be ascertained, the execution will then be void for the whole.

§ 50. An appointment to persons who are not objects of the power, will be void as to those persons, but good as to those who are objects of the power.

An Appointment to Persons not Objects of the Power, is void.

Goodtitle v. Weal, 2 Will. R. 369.

§ 51. *James Alexander* gave by his will 6000 *l.* to two trustees, upon trust to pay the interest and produce to his wife for life; and gave unto his said wife the absolute disposal of the said sum of 6000 *l.* unto and amongst such children begotten between them, and in such proportions, as she should by her last will and testament, or by any deed or deeds, &c. direct, limit, or appoint.

Alexander v. Alexander, 2 Vesey 640.

The mother, by her will, appointed part of the money to two of her children, but in trust to pay the interest thereof to their sister *Catherine* for her life, and, after her death, to pay the principal to the children of *Catherine*.

It was held by Sir *Thomas Clarke*, that the provision made for *Catherine* was good, but that the appointment to the children of *Catherine* was void, because a power
to

to appoint to children, would, in no case, warrant an appointment to grandchildren.

Adams v.
Adams,
Cowp. Rep.
651.

§ 52. Lands were limited to *Shute Adams* for life, remainder to *Frances Adams* his wife for life, remainder to the use of such child or children of the said *Shute Adams* and *Frances* his wife, and for such estate and estates as they should jointly, or as the survivor, in case of no joint appointment, should by deed or writing, direct or appoint; and, for want of such direction or appointment, to the use of the first and every other son of the said *Shute Adams* and *Frances* his wife, severally and successively, in tail. *Frances Adams* survived her husband, and, by deed, reciting her power, appointed the premises to the use of *Mary Shute Adams* her eldest surviving daughter, for life, remainder to trustees and their heirs to preserve contingent remainders, remainder to the first and other sons of the said *Mary Shute Adams* in tail male, remainder to her daughters in tail general, remainder to *Catherine Adams* (the other daughter of *Frances*) for life, remainder to trustees to preserve contingent remainders, remainder to her sons and daughters in the same manner, remainder to the use of the right heirs of the said *Frances* for ever. *Frances Adams* died, leaving the said two daughters and one son.

This case being referred by the Court of Chancery to the Court of King's Bench, that court certified their opinion, that, though *Frances Adams* had exceeded her power, which was confined to child or children, by limiting estates to her grandchildren, yet they thought the

the same ought to prevail, so far as her power extended, and that the limitations to her daughters for life were good, but that the disposition of the inheritance to the child or children was void. They were, therefore, of opinion, that there was no appointment of the inheritance of the premises; that the son took an estate tail therein, subject to the estate for life, to his sisters.

§ 53. Lady *Burlington* devised all her real estates to trustees to the use of her son-in-law, the Marquis of *Hartington*, for life, and, after his decease, to the use and behoof of such of his child or children, by *Charlotte Lady Cavendish*, his late wife, for such estate and estates, and in such shares and proportions, and under and subject to such powers, provisos, conditions, restrictions, or limitations, as he should, by deed or will, nominate, direct, or appoint; and in default of such nomination, to the use of all and every the child and children of the said Marquis of *Hartington* by his said wife, equally to be divided between them as tenants in common, and of the several heirs of their bodies.

Doe v. Lord
G. Cavendish,
4 Term Rep.
741.

The Marquis of *Hartington* (being Duke of *Devonshire*) made his will, by which he gave all the estates which he had power to dispose of, under Lady *Burlington's* will, to his two younger sons, *Richard* and *George Cavendish*, for life, with remainder to their first and other sons in tail male, with remainder to his eldest son in fee.

Upon

Upon a case reserved in ejectment, the question was, whether the Duke's will was a good execution of the power given him by Lady *Burlington*, to any, and what extent.

Lord *Mansfield* delivered the opinion of the court. The first question determined, was, that the plaintiff's deriving great benefit under the Duke's will, were bound to acquiesce in his dispositions throughout. 2d, That the appointment was good to Lord *George* for life, and, therefore, the ejectment was premature. 3d, The court was of opinion, that the appointment to the children of Lord *George* was good. But, as to this last point, the opinion of the court, which was extrajudicial, seems to be contradicted by the following cases.

Vide *Fearne*
Ex. Dev.
4th Edit. 349.

Robinson v.
Hardcastle,
2 Term Rep.
341.
2 Bro. Rep.
32. 344.

§ 54. By settlement on the marriage of *James Dunn* and *Dorothy Wright*, certain estates were conveyed to the use of *James Dunn* for life, remainder to the use of trustees, in trust for such child or children of the said *James Dunn* and *Dorothy Wright*, and for such estates, and in such proportions, as the said *James Dunn* should by deed or will appoint; and in default of such appointment, in trust for the first and other sons of the said *James Dunn* by the said *Dorothy*, in tail male; and in default of such issue, in trust to raise portions for daughters, &c.

James Dunn having by the said *Dorothy* one son and four daughters, devised part of the estates, namely, the estate of *Great Chilton* and *Dalton Percy*, charged with

with his debts and two annuities, to two of his daughters, to the use of his son *James Dunn* for life, remainder to the first and other sons of the said *James Dunn* the son, in tail general, remainder to his daughters in tail, as tenants in common, remainder as to that part of his estate at *Great Chilton*, which lay on the east side of the road, to one of his daughters in fee; and as to the part which lay on the west side, to another daughter in fee. Upon the death of *James Dunn* the father, his son entered on the estates devised to him, and having suffered a recovery of them, to the use of himself in fee, he disposed of them by his will, and died without issue.

An ejectment was brought by the two sisters, to whom *James Dunn* had appointed the premises, on failure of issue of the son of his son; and upon a case sent out of the Court of Chancery to the Court of King's Bench, that court was of opinion, that the appointment to the sons of *James Dunn* the son was void.

Griffith v. Harrison,
3 Bro. Rep. 410.

§ 55. A power of revocation and appointment cannot be delegated to another, whether the power relates to the land, or is collateral to it, it being a principle of law, that *delegatus non potest delegare*.

A Power cannot be delegated.

§ 56. A husband by his marriage articles and settlement, had a power of disposing, by deed or will, of a reversionary interest, to the issue of the marriage, in such proportions as he should think fit. The husband, by his will, reciting the power, delegated it to

Ingram v. Ingram,
2 Atk. 83.

his wife, that she might dispose of the estate among the children, in such proportions as she should think proper.

Lord *Hardwicke* said, this must be considered as a power of attorney, which could only be executed by the husband, to whom it was confined, and was not in its nature transmissible to a third person.

Unless there
are special
Words.

§ 57. But if a power be expressly reserved to be executed by a person and his assigns, an execution by an assignee will, in such case, be good; and a devisee will be a good assignee, within the words of such a power.

How v.
Whitfield,
1 Vent. 338.
2 Show. 57.
3 Freem. 476.

§ 58. A fine was levied of certain lands, to the use of *T.* for life, remainder to *J.* his son and the heirs male of his body, remainder to *J.* his executors and assigns, for eighty years, and that he and his assigns of the said term should have full power and authority, to demise, &c. for twenty-one years or three lives, rendering the ancient rent. *T.* the son devised this term, and died without issue male. The devisee entered, made his executors, and died. The executor assigned over the term, with power to make leases, and the question was, whether the power annexed to the term for eighty years was transferable with the term to assignees in law. The court was of opinion, that the power was well transferred, and had been good, if reserved to a stranger. But here it was annexed to an interest and not merely collateral, and the assignees might execute it. The court

also conceived, that assignees included assignees in law as well as in fact, but that the tenant in tail, having devised the term, the devisee was an assignee, and the power, in the greatest strictness of acceptation, was in *feri*, and consequently must go to his executors, and by the same reason to their assignee.

§ 59. An instrument may in some cases take effect, either as an appointment of the use, or as a common law conveyance; and in *Clere's* case it was determined, that where a feoffment was made to the use of such person and persons as the feoffor should appoint, and until appointment, to the use of himself and his heirs; if in such a case the feoffor devised the land by will (having a power to devise it) as owner, without any reference to his power, it would pass as a devise, by the will; and not as appointed, under the power. For the testator had an estate devisable in him, and also a power to limit a use, and he had his election to pursue whichever of them he chose; so that when he devised the land itself, without any reference to his power, he shewed his intention to pass the estate by his will, as owner of the land, and not to limit a use under his power.

In what Cases
an Instrument
operates as an
Appointment,
6 Rep. 18 a.
Cro. Eliz. 877.
Cio. Jac. 31.
Hob. 160.

Croft v.
Hudson,
ch. 20.

§ 60. By the settlement, made on the marriage of *Thomas and Elizabeth Cox* in 1777, a power of revoking the uses of the settlement, with the consent of the trustees, was given to *Cox* and his wife, so as before such revocation they should convey and assure other lands, of equal or better value, in lieu thereof, to the same uses. By indentures of lease and release,

Cox v.
Chamberlain,
4 Ves. Jun.
631.

dated in 1784, a capital messuage and other premises were conveyed to a trustee and his heirs, to hold to him and his heirs, to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes, and agreements, as *Thomas Cox* should, by deed or writing under his hand and seal, limit and appoint; and, in default thereof, to the use of the said *Thomas Cox*, his heirs and assigns. In 1792, *Thomas Cox* entered into a contract to sell the estates, comprised in the settlement of 1777.

By indentures of lease and release, dated in 1792, *Thomas Cox*, in pursuance of all powers in him vested, did, with the consent of the surviving trustees in the marriage settlement, grant, bargain, sell, alien, release and confirm, limit, declare, and appoint, and the said *Thomas Cox* and his wife did, with the like consent and approbation, convey and assure to the said surviving trustees and their heirs and assigns, the said capital messuage, comprised in the indentures of 1784, to hold to them, their heirs and assigns, to and for the same uses, trusts, intents and purposes, as were declared in the settlement of 1777.

Thomas Cox and his wife revoked the uses of the settlement.

Some doubts having been thrown upon the title, with respect to the value of the substituted estates, and also upon the supposition, that the indenture of August 1792, was intended to operate as an execution of a
power,

power, and therefore it was doubtful whether the legal estate did not vest in the trustees, in which case the uses declared thereon would be void at law, and would be good only as trusts in equity, the purchaser declined to complete the contract; upon which a bill was filed against him for a specific performance: and the usual decree was made, referring it to the Master to enquire whether a good title could be made. Infra c. 65.

The Master reported, that the substituted estates were of greater value than the estates comprised in the marriage settlement; and that the plaintiff could make a good title to the estates, comprised in the agreement.

Exceptions were taken to this report: and in support of them it was observed, that *Thomas Cox*, in the release of 1792, used words applying to the conveyance of an estate in fee simple, and also to the execution of a power of appointment; such an union was very unapt and improper; but the instrument, though inaccurate, amounted to a complete execution of the power: then the other words, importing the conveyance of an interest, were completely inoperative. Considering it then as the execution of a power, the necessary effect of it was, to vest the legal estate in trustees, and then the objection arose; the estates of the persons beneficially interested being merely equitable; in which respect there was a material deviation from the settlement, which vested the legal estate in the persons beneficially interested.

Ante f. 59.

In answer to this objection it was said, that the only question was, whether the deeds of 1792 operated as a conveyance by lease and release, or as the execution of a power? The whole objection rested upon this, that it must operate as the latter: but, where a man has an interest and also a power, and does an act which may be either a conveyance of the interest, or the execution of a power, it shall be referred to his interest and not to his power. Sir *Edward Clere's* case was an authority expressly to that point. This was a conveyance to the uses of the marriage settlement, and that conveyed the legal estate to the *cestuis que use*. The instrument was certainly more proper for the conveyance of an interest, than for the execution of a power: the words of appointment were thrown in generally by the conveyancer, and were quite superfluous. The party had no intention of executing the power: the court always makes the deed operate according to the intention, if by law it may. The intention was declared to be, to vest the estate in the trustees to the uses of the marriage settlement: there was no room, therefore, for the presumption, that the intention was merely to execute the power, not to convey an interest; that presumption was in opposition to the deed, which goes to declare, that the estate vested in them, and was to enure to the uses of the settlement; it did not begin with words of appointment, but with those importing conveyance. The order, in which the words appeared, concurred with the form of the instrument to shew, that the first words in order were intended to be the operative words: he threw in the words of appointment, if necessary,

necessary, meaning to make use of all the powers that were in him. The deed did not recite the power particularly, but was in pursuance of all powers. There was considerable doubt, whether the power was not merged in the interest he had, upon the authority of the late case of *Goodill v. Brigham*. But, if the legal estate was vested in trustees, yet the proviso in the settlement was substantially complied with: for the estates were in equity in the persons entitled under the settlement; and they could come into Chancery for the legal estate, whenever they thought fit. Ante ch. 15.

Master of the Rolls.—The plaintiff, having entered into this contract, has conveyed the substituted estates by the deeds of 1792, in pursuance of all powers in him vested, and containing words both of conveyance and of appointment. This was preparatory to the revocation of the uses of the settlement, and to enable the plaintiff and his wife to revoke them under the power. The question is, whether under this deed there is a good execution of the condition in the proviso; or, in other words, whether by the deeds, the plaintiff had legally conveyed to the trustees in the settlement, this other estate, exactly in the same manner, and to the same uses, as the estate comprised in the settlement. The objection is entirely technical, and certainly very nice, and I think a little too refined; though an objection of that sort certainly may be fairly made; and I will not find fault with a purchaser for taking the opinion of the court upon it, if gentlemen of great character really state it as a fair ground of objection. The objection arises from the

T 4

mode,

mode, in which the estate substituted was conveyed to the plaintiff; which was, to the use of such person or persons, and for such estate or estates, interest or interests, and with, under, and subject to, such powers, provisos, and agreements, as he should, by deed or writing under his hand and seal, limit, declare, or appoint, and, in default thereof, to the use of him, his heirs and assigns. This therefore was vested in him at the time of the substitution; and the mode which he takes for that purpose is; not by expressly declaring that in pursuance of the power he appoints, but by this conveyance of lease and release; in which he uses words that cannot at all apply to the power: and, as he had both a power and an interest, it is now said, to invalidate the deed, the court must say, he did this in execution of his power only, and not to convey his interest; that it must be referred only to the power, though the trustees are in possession by virtue of the lease, which was perfectly nugatory if he meant only to execute his power. That is going out of the way to raise objections, which the court is in the habit of very much discouraging. I will not determine, whether it would not have been a fatal objection, if it had been an execution of the power, vesting a trust estate instead of the legal estate under the settlement. Unquestionably it would be so at law.

I shall not enter into the question, whether upon the case of *Goodill v. Brigham*, the power could not have been exercised. I think, notwithstanding that I have appointed a use under the power;

for

for I do not conceive the Judges meant to decide, that where there is a conveyance to such uses as a man shall appoint, and, in default of appointment, to his own right heirs, the party may not under the power create an estate that will supersede the estate in fee, though perhaps not to bar dower. If that case is taken in the full extent, it is very doubtful, and would set aside half the conveyances in the kingdom, and I desire to be understood, that is not my opinion. But I do not by any means go upon that ground. I will suppose he had the power; but he also had an interest. The very respectable opinions, upon which this objection has been taken, only state it as a doubt; and they are opposed by the opinion of another gentleman in favour of the title. But I must determine upon the case, as it appears upon consideration of the conveyance; and I am clearly of opinion, upon every principle upon which the court acts with regard to the construction of conveyances, that it would be monstrous in this case to hold, that where there is a power and an interest, and the act being equivocal, it is doubtful whether he acted under the one or the other, the court should adopt that, which would defeat the instrument. But this case goes farther: for the act is not equivocal. The party has made use of words, that have no reference to the execution of a power. I am of opinion, therefore, that this is an exceedingly good title.

§ 61. With respect to the effects attending the execution of a power, it has been already stated, that when a power is executed, the former uses and estates

cease,

Effects of the
Execution of
a Power.

cease, and a new use springs up to the appointee, which is derived from the feisin or *scintilla juris* of the releasees or trustees, and the statute immediately executes the possession to such new uses, by which means the appointee acquires the legal estate, without entry or claim.

1 Inst. 376 b.

2. 1.

2 Atk. 565.

§ 62. Although estates which arise from the execution of powers owe their commencement to the deed of appointment, yet the appointee under a power does not derive his title from the appointor, or out of the estate whereof the appointor is seised, but comes in directly under the original conveyance, by which the power was created, and the uses declared by the appointment, being in order prior to the uses limited by the original deed; which only take place in the mean time, and until the appointment, such new uses precede them, and the appointment operates by relation, from the time when the original deed was executed, just as if the estate created by the appointment had been actually limited in the original conveyance.

2 Ves. 78.

§ 63. In the case of the Duke of *Marlborough* v. Lord *Godolphin*, which arose upon an appointment of personal estate, Lord *Hardwicke* said—" I admit the
 " principle, that where a person takes by execution
 " of a power, whether of reality or personalty, it is
 " taken under the authority of that power: but not
 " from the time of the creation of that power.
 " There is no case that the relation shall go back for
 " that, which is quite of another nature: and that is
 " the

“ the point, which must be contended for here, that
 “ they must take by relation, so as to make them
 “ take from the time of the creation of the power ;
 “ for which there is no authority : and that would be
 “ unreasonable. The meaning that the persons must
 “ take under the power, or as if their names had
 “ been inserted in the power, is, that they shall take
 “ in the same manner as if the power and instrument
 “ executing the power had been incorporated in one
 “ instrument ; then they shall take, as if all that
 “ was in the instrument executing, had been expressed
 “ in that giving the power. So is it in appointments
 “ of uses. If a feoffment is executed to such uses,
 “ as he shall appoint by will, when the will is made,
 “ it is clear, that the appointee, *cestui que use*, is in
 “ by the feoffment ; but has nothing from the time of
 “ the execution of the feoffment, so as to vest the
 “ estate in him. The estate will vest in him accord-
 “ ing to the nature of the act done, and appoint-
 “ ment of the use, from the time of the testator’s
 “ death. This, therefore, is not a relation, so as to
 “ make things vest from the time of the power, but
 “ according to the time of that act executing that
 “ power ; not like the referring back in case of
 “ assignment in commission of bankruptcy : that is,
 “ by force of the statute, and to avoid *mesne* wrong-
 “ ful acts. The case was put of a bargain and sale ;
 “ which was said to be like this of a will, or instru-
 “ ment in nature of a will. A bargain and sale,
 “ when acknowledged and enrolled, has relation to
 “ the time of execution ; and if the grantee dies
 “ within six months, and afterwards it is acknow-
 “ ledged

“ ledged and inrolled, it is good ; that is, because it
 “ is a collateral act acquired by act of parliament,
 “ and not arising from the nature of the instrument
 “ itself.”

1 Inst. 216 a.
 n. 2.

§ 64. Where an estate is limited to such uses as *A. B.* shall appoint, and in the mean time, and until appointment to the use of the said *A. B.* and his heirs ; if *A. B.* happens to be married at the time when such conveyance is made, his wife becomes entitled to dower. But if *A. B.* executes his power of appointment, a new use arises, and vests in the appointee, and the fee simple originally limited to *A. B.* ceases, by which means, it is supposed that his wife's right to dower will also cease.

1 Inst. 379 b.
 n. 1.
 Vide 4 Vef.
 Jun. 637.

Tit. 12. c. 1.
 f. 11.

§ 65. An appointment in pursuance of a power operates under the statute of uses, not as a conveyance of the land, but as a substitution of a new use, in the place of a former one ; and a use appointed under a power takes effect in the same manner as if it had been inserted in the original deed, in the place of the power. From which it follows, that if an appointment is made under a power to *A.* to the use of *B.* and his heirs, it is a limitation of a use upon a use ; and consequently *B.* only takes a trust estate. It is therefore the practice, where an appointment is made to particular uses, to appoint the lands not to trustees to uses, as in the case of a release, but to the particular uses intended.

§ 66. Where

§ 66. Where a person settles his estate to the use of himself for life, remainder over, reserving to himself a power of revocation, and executes his power, he becomes immediately seised of his former estate, without any entry or claim; because, as he is already in possession, he cannot enter on himself, and the revocation is stronger than any claim can be.

1 Inst. 218 b.
1 Rep. 174 a.

§ 67. It was resolved in *Digge's* case, that other uses might be limited or raised by the same conveyance, which revoked the former uses, for inasmuch as the ancient uses cease *ipso facto* by the revocation, without claim or other act, the law will adjudge priority of the operation of one and the same deed, although it be sealed and delivered at one and the same instant; and therefore in construction of law, it shall first be a revocation, and a ceffer of the ancient uses, and then a limitation or raising of the new ones; for the best construction of the statute of uses was to make them subject to the rules of the common law, according to which, if two acts were done by one and the same means, and took place in one and the same instant, the law would so construe them, that that act should be taken to precede, which would give efficacy to the entire instrument.

1 Rep. 174 a.
6 Rep. 33 a.

§ 68. The execution of a power will not defeat an estate previously created, by the person who executes it.

Will not
defeat a Prior
Estate.

§ 69. An estate was settled, in consideration of marriage, to A. for life, &c. and a power was given to

Goodright
v. Cator,
Doug. 477.

to *A.*, with the consent of the trustees, to revoke all the uses. *A.* conveyed away his life estate, for securing an annuity, to a person for ninety-nine years, if he should so long live, and afterwards, with the consent of the trustees, revoked all the uses of the settlement. It was held that this revocation did not affect the estate granted for securing the annuity.

TITLE XXXII.

D E E D.

CHAP. XVII.

Of Powers to Jointure.§ 1. *Origin of.*2. *Construction of the Words—
not exceeding the clear
yearly Value.*§ 6. *Power to limit a Jointure
proportioned to the Wife's
Fortune.*

Section 1.

SOON after the statute of uses, the practice of conveying estates in strict settlement became frequent. Origin of.
But as estates for life are not subject to dower, a power was usually given to the tenant for life, of limiting an estate to any woman he should marry, for her life, by way of jointure, which is now universally practised.

§ 2. In powers of this kind, the usual phrase is, that it shall be lawful for the tenant for life to appoint any part of the lands comprised in the settlement to his wife, as a jointure, not exceeding the clear yearly value of a certain sum. Construction
of the Words,
not exceeding
the clear
yearly Value.

§ 3. A question having arisen in Lord *Hardwicke's* time, respecting the construction of this expression, his Lordship said, there were two things to be considered, first, what was the meaning of these words; and, Tyrconnel v.
Ancafter,
Amb. R. 237.
2 Vef. 502.
secondly,

secondly, at what time they were to be applied. As to the time, they must be lands of the clear yearly value, expressed at the time of making the jointure; and there is no obligation on the remainder-man, or lien on his estate, to have the jointure continue of the same yearly value during the continuance of the jointure, which is always the rule in the execution of these powers; the contrary doctrine would be productive of very great inconvenience: these powers would then be executory and fluctuating: none would know when the power was executed. New bills must be brought against remainder-men, and the power must be executed by subsequent tenants for life.

This doctrine is applicable, not only to the execution of such a power, as to charges on the estate, but also to the *quantum* of the land-tax: for, though that tax might rise afterwards, the *quantum* of the jointure is not on that account to be varied. It is sufficient that the master should see it exonerated from the land-tax, according to the rate it stood at, when the power was executed; for otherwise it would follow, that whenever the land tax increased, it would create a deficiency in the jointure, and the jointress might come into a court of equity to have it made good against the remainder-man. The great question then is, from what charges, impositions or outgoings, an estate of this kind ought to be exempted, at the time of making the jointure. The words are, *not exceeding the clear yearly value*, which do not extend to the land tax; clear must not mean all outgoings, such as losses by tenants, management, &c. to which a rent-charge is not liable, but

what would be understood between buyer and seller; that is, all reprises and incumbrances, and all extraordinary charges unusual, and not agreeable to the custom of the country; and then the land tax is not to be considered. The jointure, then, must be clear of incumbrances, and all other charges, which, by the course and usage of the country in which the lands lie, ought to be borne by the tenant, but subject to the land tax and all other outgoings which, according to such course of the country, ought to be borne by the landlord.

§ 4. Where a power of jointuring was given, not exceeding 4000 *l. per annum*, without any deduction or abatement for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise, Lord *Hardwicke* held, this did not mean such taxes only as were fixed and certain, but the land tax, though a fluctuating one, was clearly within the power.

Blandford v. Marlborough, 2 Atk. 542.

§ 5. It is now a common practice, to give tenants for life a power of appointing a rent-charge to their wives by way of jointure: and where the power is to appoint all or any part of the lands, the usual way is to appoint certain lands to the wife, with a proviso, that in case the person next in remainder shall pay to the wife a yearly sum out of the rents as a jointure, then that he may retain the possession of the lands.

§ 6. Where a person has a power to appoint a jointure, not exceeding 100 *l.* a year for every thousand

Power to limit a Jointure proportioned to the Wife's Fortune.

he acquires, as a marriage portion, and part of the wife's fortune is limited to the husband for life, remainder to increase the younger children's portions, although there be no younger children, and it goes back to the wife, yet it will be considered as received by the husband, and within the intent of the power, and the husband will be compelled to settle a jointure accordingly.

Tyrconnel v.
D. of An-
caster, 2 Ves.
499.

§ 7. Sir *B. Sherrard*, being tenant for life, with such a power as is mentioned in the preceding section, married a Lady who had 10,000 *l.*, and, in consideration thereof, settled an estate on her of 800 *l.* a year, and covenanted to settle 200 *l.* more to make it up 1000 *l.*, and the sum of 2000 *l.*, part of the wife's fortune, was continued at interest for the benefit of the younger children, and, in case of no children, to go to the survivor; but the interest thereof was to be paid to the husband during his life. There were no children, and the wife survived.

The question was, what portion the husband was considered to have received with his wife, and, consequently, how many 100 *l.* *per annum* she was entitled to have.

Lord *Hardwicke*.—The question is, whether Sir *B. Sherrard* is to be considered as having received 8000 *l.* or 10,000 *l.* I am of opinion, he must be considered as having received a portion of 10,000 *l.* with his wife. The objection is, that 2000 *l.*, though part of her portion, was not received by Sir *B. Sherrard*, and
that,

that, in consequence of the settlement, it came back to her, there being no younger children, and is not to be considered as part of the portion, in consideration of which, the jointure was made. But I am of opinion, that objection does not hold. I agree, that where a jointure is to be made under such limited powers, of a portion to be received, the transaction must be fair, *bonâ fide* without fraud and collusion; and, therefore, if it is a nominal, and not a real portion, that will not do; as, where a man who marries a lady with a small portion, and either he or his friends advance money to make it up a nominal portion, and, after the marriage, take it back. So, if the wife had a portion which was settled to her separate use, it would not do. Parents create these powers for the purpose of compelling their children to marry wives of an adequate fortune, and not to burthen the estate with a great jointure for a wife, who brings nothing into the family: whenever, therefore, the portion of the wife is stipulated to be applied in a proper and reasonable manner, for the benefit of the family, that is to be considered as a portion received. The father could not mean that every part of this portion should be received by his son to spend and waste; if it was settled so as to become beneficial to the family, in the fair way of making settlements, it was sufficient. These parties were young at the time of marriage, and might have several children. It was reasonable to take so much of the wife's fortune as an increase of the younger childrens portions, which the husband had under his father's will a power to settle, nor was there any impropriety in giving the wife a chance of survivorship. This, then, is an ap-

plication of the portion by the husband, in a reasonable and fair way, and, therefore, to be considered as within the intent of the power. If the interest of the 2000 *l.* had been only given to the husband for life, and, afterwards, the principal to the wife, that would be a strong case to say, it was not within the intent of the power. But the money being only given to the wife, on failure of younger children, and on the husband's dying first, both which events happened, it differs from that case. If the portion was to be paid to the husband, to do what he pleased with it, and not to be settled for the benefit of the family, fathers would hardly create such a power. I therefore consider, that what is fairly settled for the family, is for the benefit of the husband, and, therefore, the widow is entitled to 1000 *l.* for her jointure,

Mansell v.
Mansell,
Harg. Jur.
Arg. v. 1.35.

§ 8. A power of jointuring a wife, may be restrained by a condition, that the marriage shall be with the consent of a third person.

TITLE XXXII.

D E E D.

CHAP. XVIII.

Of Powers to Lease.

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|--|---|
| <p>§ 1. <i>Origin of.</i>
 2. <i>Construed strictly.</i>
 5. <i>Restrictions annexed to leasing Powers.</i>
 6. <i>1st, As to the Instrument.</i>
 8. <i>2d, As to the Lands to be leased.</i>
 23. <i>3d, As to the Time when the Lease is to commence.</i>
 34. <i>A general Power only authorises Leases in Possession.</i></p> | <p>§ 33. <i>Of concurrent Leases.</i>
 39. <i>A Lease to commence from the Day of the Date, is not a Lease in Reversion.</i>
 41. <i>4th, As to the Duration of the Lease.</i>
 47. <i>5th, As to the Rent.</i>
 53. <i>6th, As to the Clauses and Covenants.</i>
 60. <i>In what Conveyances leasing Powers may be inserted.</i></p> |
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Section I.

AS Leases made by tenants for life determine upon the death of the lessor, powers are usually inserted in settlements, enabling the tenants for life to grant leases, which shall be valid against the persons in remainder or reversion, Origin of.

Powers of this kind are productive of great advantages, not only to the tenants for life, and the persons in remainder and reversion, but also to the public : the tenants for life are thereby enabled to grant a certain term to the lessee, by which means they get a higher rent, which is equally beneficial to the remainder-men and reversioner ; and the public is benefited by this system,

U 3

1 Burr. Rep. 120.

system, because the extent and security of the tenant's interest, induces him to expend his capital in the cultivation and improvement of the estate.

Construed
strictly.

*Doe v. Lady
Cavan.
5 Term R.
567.*

§ 2. But, least the tenant for life should exert this power to the prejudice of the persons in remainder or reversion, he is, in general, restrained by the words of the power, from making any leases but on certain conditions, by which means, the tenant for life is obliged to secure the same advantages to the remainder-men and reversioner, which he reserves for himself. The restrictive part of such powers ought, therefore, to be construed strictly against the tenant for life, and in favour of the remainder-man and reversioner; because the conditions upon which the power is given, are inserted with a view to their interest, and the lessee under such a lease, standing only in the place of the tenant for life, and deriving his title merely under the power, if that be not completely executed, the right of the remainder-man to possess the estate, freed from the lease, will take place of the right of the lessee, as superior to it: from whence, it follows, that every circumstance required by the power must be strictly complied with, otherwise the lease will be void.

*Vide Doe v.
Sandham,
infra.*

§ 3. Thus, it appears, that the instruments by which leasing powers are executed, are construed somewhat differently from other deeds of appointment; for, it being expressly required that tenants for life should execute their powers of leasing in a particular manner, that becomes a condition precedent; and if all the circumstances required by the power are not complied

complied with, the power is held to be totally unexecuted: so that, if an improper covenant is inserted in a lease made in pursuance of a power, the lease is thereby void in its creation, and not the covenant only, and will not bind the remainder-man.

§ 4. Where a qualification is annexed to a general power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification.

Vide Cumberford's Case, *infra*, f. 15.

§ 5. The restrictions, which are usually annexed to leasing powers, relate, 1st, To the instrument by which the power is executed; 2d, To the lands to be let; 3d, To the time when the lease is to commence; 4th, To the duration of the lease; 5th, To the rent directed to be reserved; and, 6th, To the clauses and covenants directed to be inserted in such leases.

Restrictions annexed to leasing Powers.

§ 6. With respect to the instrument by which a leasing power is directed to be executed, it is generally required to be by a deed indented, sealed and delivered in the presence of two or more witnesses; and it is also usually required, that the tenant should execute a counterpart of such indenture.

1st, As to the Instrument.

1 Burr. Rep. 125.

§ 7. Livery of seisin is not necessary to be given on a freehold lease, made in execution of a power. Because a lease made in execution of a power, takes effect from the deed by which the power is created; and the legal estate is transferred by the operation of the statute of uses.

1 Vent. 291.
2 Lev. 149.

2d. As to the
Lands to be
leased.

§ 8. With respect to the lands to be let, powers of leasing are, in general, restrained to lands which have usually been let or demised to farmers, in order to prevent the tenant for life from leasing the mansion-house, parks, gardens, pleasure grounds, or other parts of the land usually occupied by the proprietors of the estate, and deemed necessary to the dignity of the family.

Vide Ante
Ch. 7. §. 34.

§ 9. This clause is copied from that which is inserted in the statute 32 Hen. 8. enabling tenants in tail to let leases: and the rules adopted by the courts of law, in cases which have arisen on that statute, apply equally to leases made in pursuance of powers.

Vaugh. 33.

§ 10. Lands which have been demised three times, are considered as lands usually let; so lands which have been demised twice: but lands which have been only once let, do not fall within the description of lands usually let; for, *usus fit ex iteratis actibus*.

§ 11. Lands not demised for the space of 21 years previous to the making of a lease, under a power, are not considered as lands usually let.

Tristram v.
Ballinglase,
Vaugh. 31.

§ 12. A person was tenant for life, with power to make leases of all or any of the lands in an indenture of settlement particularly mentioned, which at any time theretofore had been usually letten or demised, for and during the term of 21 years, reserving the rents therefore then usually paid, or more. The tenant for life made a lease of part of the premises contained in the settlement, which had been let at 100 l. *per annum* for

for 21 years; but the term of 21 years was expired, and the premises had not been letten for 21 years before the demise, under the power which was the subject in dispute,

The question was, whether these lands came within the description of lands at any time heretofore usually demised.

Lord Chief Justice *Vaughan* said, the words usually demised, might be taken in two senses; the one, for the often farming or repeated acts of leasing lands, to which sense this case did reasonably extend; the other, for the common continuance of lands in lease, for that was actually demised; and so lands leased for 500 years long since, were lands usually demised, that was, in lease, though they had not been more than once demised: and the former construction agreed both with the words and intention of the settlement. But what was not farmed at the time of this proviso's being made, nor 20 years before, could not be said to be at any time before commonly farmed: for those 20 years was a time before, in which it was not farmed. Besides the proviso reserving the rents thereupon reserved at the time of the deed made, necessarily implied, that the land demisable by that proviso must be land which was then under rent; for, when no rent then was, the rent *then* thereupon reserved, could not be reserved. But the premises in question had then no rent upon them, for they were not let for 20 years before, nor then, and, therefore, were not demisable by that power.

Right v.
Thomas,
§ Burr, 1441.

§ 13. A covenant to stand seised, is considered, in law, as evidence of the usual manner of demising; and the objection, that the covenant to stand seised in question, was by way of provision for a younger child, was deemed to be of no weight; for that was every day's practice.

§ 14. It has been already stated, that a qualification which goes in destruction of a power, will be dispensed with. In consequence of this principle, it has been determined, that where a power of leasing is given generally, provided the antient rents be reserved, lands which were not before in lease may be demised.

Cumberland's
Case, 2 Roll
Ab. 262.

§ 15. A conveyance was made of divers manors, messuages, rents, services, &c. to the use of *A. B.* for life, &c. with power to make leases of the premises, or any part or parcel thereof, for three lives, so that such rent, or more, was reserved upon every lease, as was reserved or paid for that, within two years then next before. Some part of the premises consisted in woods, that had not been before leased, at any rent within the two years. It was determined, that the tenant for life might, by force of such power, make leases of that part, reserving such rent as he pleased, because it appeared by the generality of the words, that it was intended he should have power to lease all the lands; and the restrictive clause was meant to apply only to such lands as had been demised for two years before.

§ 16. An

§ 16. An estate, which consisted of lands and a rectory, &c. was conveyed to the use of a person for life, with a power to let the premises, or any part of them, so as a rent of 5 s. was reserved for every acre of land. The tenant for life demised the rectory, which consisted of tithes only, reserving a rent; and the question was, whether the power warranted such a lease.

Walker v.
Wakeman,
1 Vent. 294.
2 Lev. 150.

It was argued that it did not, for a construction was to be made on the whole clauses, and the latter words that appointed a reservation of rent, should explain the former, and restrain the general word premises to land only, or things out of which rent might issue, which it could not out of tithes.

But it was resolved by the court, on the authority of *Cumberford's* case, that the lease of the rectory was good; for the power was general, and enabling, and the last clause being affirmative, though restrictive, would not restrain the generality of the former ones. Therefore, here the power must be construed to be, to demise the premises that consisted of acres at 5 s. an acre, but of what were not acres, no rent need be reserved.

Ante l. 15.

And it was said by Lord *Hale*, that if the power had been to let the manor and rectory, expressly reserving 5 s. *per* acre, the lease had been good of the rectory, without any rent,

3 Keb. 597.

§ 17. A manor and other hereditaments were settled, with a power to the tenant for life to make leases, excepting

Winter v.
Loveden,
1 L. Ray. 267.
Com. R. 37.
12 Mod. 147.

cepting the ancient demesne lands, and so as the ancient rent was reserved.

It was determined, that this power did not enable the tenant for life to demise the copyhold lands held of the manor, because they were not part of the demesnes. But that the rents and services of the manor might be demised, notwithstanding that one qualification annexed to the exercise of it was, *that the ancient rent should be reserved*, and no rent could be reserved on a lease of rents and services; for it appeared, that part of the manor was intended to be comprised within the power; but as the demesne lands were not comprised, the rents and services must, for the whole manor consisted of demesnes, rents and services; and, if a man had a power reserved to him of making leases of two things, and a qualification was annexed to the power, which could not extend to one of these things, he might make a lease of that thing without any regard to the qualification.

Goodtitle v.
Funacan,
Doug. 565.

§ 18. A tenant for life, with power to demise all the lands, reserving so much, or a greater yearly rent, as then was paid, made a lease of a manor and fishery, which had never been let, together with other premises, reserving a greater rent than had formerly been reserved. It was contended, that the manor and fishery were not demisable under the power, as no rent was then paid for them. But it was answered, that the qualification in the power, with regard to the reservation of rent then paid, could only apply to such parts of the subject of the power as were then let; but

but the power itself expressly extended to the manors and fishery, and it must have been known at the time of the settlement, that neither the manors nor fishery were then let; for, where a general authority is given by a power, to let manors, lands, &c. and afterwards, there is a qualification, that the usual rent shall be reserved, such affirmative qualification shall not restrain the generality of the power, but shall only apply to that part which was formerly demised. It was objected, that as the rent was entire, and could not be apportioned, it was not clear that the ancient rent was reserved for that part of the premises which had formerly been let. In answer to which, it was said to be sufficient, that the advance on the whole was 30 l., and that the fishery was only worth 15 l. a year, and that the manor was not of any pecuniary value.

Lord *Mansfield*.—“ The power is express to demise
 “ the manors and fisheries; they are particularly men-
 “ tioned in the settlement; and the power goes to the
 “ whole: they pay under this lease as great a yearly
 “ rent as at the time of the settlement, for they paid
 “ nothing then; the words, therefore, are complied
 “ with; and this objection could only stand upon
 “ intent: but we think no such intent appears. The
 “ manors are nominal, of no value, no object of yearly
 “ income; the fishery worth only 15 l. a year; they
 “ are convenient to the lessee living on the land, and
 “ of no use to the remainder-man; the right of shoot-
 “ ing and fishing is reserved to him. For my own
 “ part, I think the intent was to give leave to demise
 “ all, reserving as much rent in the whole, as had
 “ been

“ been paid before ; and, in fact, 30 *l.* more has been
 “ reserved.”

The court was of opinion, that the lease was good.

§ 19. A power may, however, be taken to be special, and not allowed to extend to all the property comprised in the deed, wherein the power is given, if it appears from the nature of the power, compared with that of the property, to have been the intention of the parties, that it should be special.

Mountjoy's
 Case, 5 Rep.
 36.

§ 20. It was found by special verdict, that the manor of *Hemstone Arundel* was intailed on Lady *Mountjoy*, with several remainders over, with a proviso, that neither of the donees should alien the said manors, or any part thereof, but only for term of life, or for years, or at will, yielding the true and ancient rent. The manor consisted of several free rents and copyhold tenements, an acre of waste, &c.

Lord *Mountjoy* and his wife demised a moiety of the manor, with the appurtenances, for 300 years.

It was resolved, that, in respect of the said acre of waste, which was never demised before, the rent, which was entirely reserved out of the whole, could not be said to be *vetus et antiquus redditus* ; for, how could it be called so, when it issued out of a thing which never was charged with any rent before.

§ 21. A power

§ 21. A power was given in a settlement, to make leases of all or any part of the premises, at such yearly rents, or more, as the same were then let at : and the question was, whether the mansion-house and demesnes could be demise under this power.

Baggot v. Oughton,
8 Mod. 249.
Fortes 332.

The court determined that they could not ; and it is said, that this judgment was affirmed by the House of Lords.

§ 22. A power was given in a will to the tenant for life, to grant, demise, and lease all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments, so as the usual rents, and other yearly payments, dues, reservations, and heriots, should be from time to time reserved and made payable.

Pomery v. Partington,
3 Term Rep.
665.

The tenant for life made a lease of tithes which had never been let before, and the question was, whether such lease was good.

It was determined, that this lease was void, because it was not the intention of the parties that the power of leasing should extend to the tithes, they never having been leased before.

Doe v. Halcombe,
7 Term Rep.
713.

§ 23. The third restriction usually inserted in powers of leasing, relates to the time when the lease is to commence, whether in possession or reversion.

3d, As to
the Time
when the
Lease is to
commence,

A lease may be considered as reversionary in two senses. In the largest sense, that is said to be a lease

Doe v.
Calvert,
2 East. R.
376.

in reversion which is to commence on a future day. In a more confined sense of the term, it signifies a lease to begin from the determination of a lease in being; in which sense, all leases where there is a particular estate outstanding, are leases in reversion; and so is the term reversion to be taken, where mention is generally made of leases in reversion under a power.

A General
Power only
authorises
Leases in
Possession.

§ 24. Where a power is given indefinitely to make leases, without mentioning the time when such leases are to commence, it shall be taken strictly against the donee of the power, and consequently be construed so as only to authorize leases in possession, and not in reversion.

Suffolk v.
Wroth,
Cro. Eliz. 5.
6 Rep. 33 a.

§ 25. *Henry Earl of Suffolk* conveyed the manor of *Burham* to the use of himself for life, remainder to his wife for life, &c. with a proviso, that it should be lawful for the Earl to make leases for twenty-one years. The Earl made a lease for twenty-one years, to begin on the *Michaelmas* following: and it was adjudged that this lease was not warranted by the power, because it was a lease in reversion; and if he might make a lease to commence on the *Michaelmas* following, he might make it commence twenty years after, which would destroy the effect of the settlement.

§ 26. A power to make leases generally, does not enable the donee of such a power, to make a lease to commence after the determination of a lease in being.

§ 27. A tenant

§ 27. A tenant for life, having a power to make leases for twenty-one years, made a lease to commence after the determination of a lease then in being. It was adjudged that such lease was void, for it ought to have been a lease in possession, and not an interest to begin *in futuro*, or reversion, after another estate determined.

Shecomb v.
Hawkins,
Cro. Ja. 318.

§ 28. In a modern case it was determined, that where a settlement was made of the reversion of lands, demised for lives or years, to the use of B. for life, with power to make leases generally, he might make a lease during the continuance of a former lease, to commence after the former; for otherwise the power would be ineffectual.

Coventry v.
Coventry,
Com. R. 312.

Vide Baynes
v. Belson,
T. Raym.
247.

§ 29. Where, in a settlement of an estate in reversion, a power is expressly given to make leases in possession, a lease in reversion will not be warranted thereby.

§ 30. A father and a son made a lease for ninety-nine years, if three persons or one of them should so long live. Afterwards they settled the reversion to the use of the father for life, remainder to the son for life, remainder over; with a power to the father to make leases for ninety-nine years or three lives, in possession, or for two lives in possession, and one in reversion, or for one life in possession and two in reversion; the father, during the continuance of the first lease, made a lease for life.

Opey v.
Thomasine,
T. Raym. 132.

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1 Com. Rep.
38, 39.

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by a former proprietor, or by the
a lease.

Berry v. Rich,
Hard. 412.

on devised lands to his son ~~for~~ life,
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Read v. Nath,
1 Leon. 137.

Justice *Keeling* inclined, that the lease was within the power, for the settlement being only of the reversion, a present lease of the reversion was within it. *Windham* and *Twisden* held, that the settlement being of a reversion, if the words of the power had been general, to make leases, a lease in reversion had been within it. But the power being expressly to make leases in possession, this lease in reversion was not within it; but the case was adjourned.

§ 31. Where a power expressly enables a person to make leases, as well in possession as in reversion, a lease in reversion will then be good.

Whitlocke's Case,
8 Rep. 67.

§ 32. *William Whitlock* being a tenant for life in reversion, with a power to make leases, as well in possession as in reversion, demised the premises for ninety-nine years, if two persons should so long live, the said term to commence after the death or determination of the estate of the prior tenant for life. And it was held to be a good lease under the power.

Of Concurrent Leases.

§ 33. The expression to lease in reversion, in its narrowest sense, hath still a different signification from either of those above mentioned, when applied in a power, to the making a lease for lives in reversion. For as a lease for lives cannot, strictly speaking, be made to commence *in futuro*, it will in that case be intended of a concurrent lease, or a lease of the reversion, that is, of that land, which is then in lease, to commence in possession, after the determination of the existing lease, though it commences in interest

1 *Ld. Ray.*
269.
1 *Com. R.* 39.
Fox v. Prickwood,
Cro. Ja. 349.

terest presently, and is concurrent with the existing lease.

§ 34. In consequence of this doctrine, the very same words, in the same identical power, may have different significations, when applied to different subjects; for when the words, “a lease in reversion” are applied to a lease for life, they shall be understood to mean a concurrent lease, or lease of the reversion, that is a lease of that land which is at the same time under a demise, and then it is not to commence at the end of the demise, but has a present commencement, and is concurrent with the prior demise. But the same words, when applied to a lease for years, shall be intended of a lease, which shall take effect after the expiration of the existing lease.

**1 Com. Rep.
38, 39.**

§ 35. It was said at the same time, by Lord Chief Justice *Holt*, that if a power enabled any one to make leases in reversion, as well as in possession, he could not make a lease in possession, and another in reversion, of the same land: but his power to make leases in reversion should be confined to such land as was not then in possession.

§ 36. Where a person has a general power to make leases, he may make a lease to commence immediately, although the lands are then held under an existing lease, made either by a former proprietor, or by the person making such lease.

**Berry v. Rich,
Hard. 412.**

§ 37. A person devised lands to his son for life, remainder over, with a proviso, that if his son made

**Read v. Nath,
1 Leon. 137.**

any alienation, &c. otherwise than a lease for twenty-one years, then he should forfeit his estate.

The son made a lease for twenty-one years, and a year before the expiration of that lease, he made another lease for twenty-one years, to begin immediately. The question was, whether the last lease was authorised by the power: it was said, that although the tenant for life could not, under the power, make leases in reversion, for then he might charge the inheritance *in infinitum*, yet such a lease as this was good; for it was to begin presently, so that the inheritance could not be charged in the whole for more than twenty-one years, and the court seems to have been of this opinion.

Goodtitle v.
Funucan,
Doug. 565.

§ 38. A person was tenant for life, with power, when in the actual possession of the premises, to demise the same to any person or persons, *in possession, but not by way of reversion, or future interest*, for the term of twenty-one years, determinable on lives: the lands were let for a year, and then the tenant for life by indenture, reciting his power, demised them for ninety-nine years, determinable on the life of the lessee; and directions were given to the tenant for a year, to pay his rent to the lessee, which he accordingly did. It was contended that this was a lease in reversion, and therefore void; but Lord *Mansfield* said, it was good as a concurrent lease, upon the authority of the case of *Read v. Nash*. The words of the statute 13 *Eliz.* c. 10. as strongly require ecclesiastical leases to be in possession, and not in reversion,

Ante f. 37.

as

as those in this or any of the common powers to tenants for life, yet in the case of *Fox v. Collier*, 1. And. 65. all the judges held, that an immediate lease for twenty-one years, of premises, on which there was a subsisting lease for four years, was good.

§ 39. It was formerly held, that a lease made to commence, from the day of the date thereof, was a lease in reversion; but this doctrine has been altered by the following determination.

A Lease to commence from the Day of the Date is not a Lease in Reversion.

§ 40. A tenant for life, with power to make leases for twenty-one years in possession, and not in reversion, made a lease to his daughter, *habendum* from the day of the date of the said indenture, for twenty-one years.

Pugh v. Duke of Leeds, Cowp. 714.

Lord *Mansfield*, after stating all the authorities on this subject, declared that *from*, might in the vulgar sense, and even in the strict propriety of language, mean either *inclusive* or *exclusive*. That the parties necessarily understood and used it in that sense which made the deed effectual. That courts of justice are to construe the words of parties, so as to effectuate these deeds, and not to destroy them; more especially when the words themselves, abstractedly, may admit of either meaning. It was therefore adjudged that the lease was to be deemed a lease in possession, and therefore good, being warranted by the power.

§ 41. The fourth restriction usually inserted in powers of leasing, relates to the duration of the lease,

4th, As to the Duration of the Lease.

The usual practice is, to restrain tenants for life from making leases for a longer term than twenty-one years, except in those countries where lands are usually let for lives, and there the tenant for life is allowed to grant leases for one, two, or three lives.

8 Rep. 79 b.

§ 42. A distinction is taken in *Whitlock's case*, where a power to make leases is, in the beginning, general, absolute, affirmative, and indefinite,⁷ as to make a lease or leases, grant or grants, &c. without any restriction, and then a proviso of correction added, namely, that such lease or leases, grant or grants, &c. shall not exceed the number of three lives, at most, or twenty-one years; which clause is negative, and qualifies the generality of the power; and where the power is particular, entire, and affirmative; for in the first case, the donee of the power may make any lease or grant, provided it does not exceed the utmost extent of interest that the power warrants; as if a person has a power to make leases, provided they do not exceed the number of three lives or twenty-one years, there he may make a lease for ninety-nine years, if three lives shall so long live, for that does not exceed the number of three lives, but in truth is less. But in the second case he must pursue the power which is particular and entire; as if a person has a power of making leases for three lives or twenty-one years, he cannot make a lease for ninety-nine years, if three lives shall so long live.

Allop v. Pine,
3 Keb. 44.

§ 43. Where a power is given to make leases for three lives, it will be well executed by a lease for three
lives,

lives, and the life of the longest liver of them, because that is the same thing.

§ 44. A person was tenant for life, with power to demise the premises in possession, for one, two, or three lives; or for thirty years, or any other number of years, determinable upon one, two, or three lives; or in reversion for one, two, or three lives, or for thirty years, or any other number of years, determinable upon one, two, or three lives.

Winter v.
Loveden,
Ante f. 21.

It was held, that an absolute lease for thirty years was good under this power.

§ 45. A power to let leases, provided they do not exceed thirty-one years, or three lives, will warrant a lease for three lives or thirty-one years, whichever shall last longest.

§ 46. Lord *Netterville*, being tenant for life, with a power of making leases, for any term or time, not exceeding thirty-one years or three lives, to commence in possession, made a lease for the lives of three persons, and the longest liver of them, or for thirty-one years, which should last longest.

Commons v.
Marshall,
6 Bro. Parl.
Ca. 168.

On a question, whether this lease was warranted by the power, it was determined by the Court of Exchequer, and also by the Court of Exchequer Chamber, in *Ireland*, that the lease was good.

On a writ of error to the House of Lords, of *England*, it was contended on the part of the remainder

man, that the power was in the disjunctive, that leases might be made for any term not exceeding thirty-one years, or three lives; but the lease in question was made for three lives, or for the term of thirty-one years, which should last longest; so that instead of leasing expressly for one or other of the terms given by the power, Lord *Netterville* leased for one or the other, as chance should direct, in manifest opposition to his power; nor could this excess be made good by construing *or* into *and*, and so making it be a certain term for lives, with a remainder for thirty-one years, for the words *which shall last longest*, show that both were not intended to pass, but one only, and which it should be was to depend on the event mentioned, and could not therefore commence in possession at the making of the lease, as expressly required by the power. On the other side it was argued, that of all powers that of leasing was the most favoured, for obvious reasons of public policy, as it would be a great discouragement to agriculture, if men who had laid out their substance, on the faith of their leases, in the cultivation of their farms, were to be deprived of those leases, on nice and critical objections to the form of them. The hardship would be greater where the objections were drawn from the terms of the power, of which the tenant was very unlikely to have any knowledge, it being notorious that in the case of families of any consideration, their tenants take, without any enquiry, such lease as their landlords propose to grant, confiding that they have the power they assume. As to the objection that the lease in question, being for three lives or thirty-one years,

years, was void for uncertainty, it was said that *or* had in many cases been construed *and*, and would always be so where the intention required it. But it was not contended that the power, though it would authorize *either*, would warrant both. But courts of law having in modern times adopted the same rules of construction, as obtain in courts of equity, in the construction of powers, and the instruments by which they are executed, would, when they were exceeded, correct the excess, and support the execution, so far as it was warranted by the power. The lease in question, so far as it was a lease for three lives, was clearly warranted by the power, and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was, to secure the estate to the lessee, for thirty-one years, in case the lease for lives should determine sooner; but this, whether it was considered as concurrent or contingent, was not warranted by the power,

After hearing counsel, the Judges were directed to deliver their opinion on the following question,
 “ Whether the lease stated in the special verdict,
 “ could be supported as a good execution of the
 “ power, or whether such lease was absolutely void?”

The Judges gave their unanimous opinion, that the lease might be supported, as a good execution of the power; whereupon the judgment was affirmed.

Doe v.
 Halcombe,
 7 Term R.
 713.

§ 47. The fifth restriction usually inserted in powers of leasing, relates to the rent directed to be reserved.

5th, As to
 the Rent.

In

In respect to which it is to be observed, that the rules of law adopted in cases of ecclesiastical leases, and of leases made by tenants in tail, under the statute of 32 Hen. 8. apply equally to leases made by virtue of powers in settlements. The usual practice is, to require that the rent to be reserved, shall be the ancient, usual, and accustomed rent, in order that the persons in remainder may not be prejudiced by such leases; but doubts have arisen respecting the construction of these words. Lord *Holt* was of opinion that the words ancient and accustomed rent, meant that rent which was reserved when the power was created, if a lease were then in being; or that which was last before reserved, if no lease were in being, for he who created such a power intended no more than that the tenant for life should not be able to put the estate in a worse condition than it was in when the power was created.

3 Cha. Rep.
66.

Idem.

Lord *Cowper* doubted as to this point, and suggested, that if lands were leased, once at a greater, and twice at a lesser rent, he should consider the rent of the former lease to be the ancient rent. The last lease might be made by the person who had the fee, and who was not bound to reserve the ancient rent, but might let it for nothing if he pleased. He likewise said, this rule could not apply to lands anciently demised, where fines had been taken, for there the rents were more or less, as the fines were higher or lower. Both these opinions seem maintainable under different circumstances, for where lands have been usually letten at rack rents, the rent that was last reserved, upon leases preceding the creation of the power,

power, should be understood to be the rent alluded to by the person creating the power. But if the owner of the freehold has not let his lands at a rack rent, but has taken fines, it appears reasonable, that in such a case, the last rent reserved where no fine was taken, should be the criterion.

§ 48. Where lands have been usually leased for lives, and the usual profits made by fines; a tenant for life under a settlement, with a power to lease, reserving so much or more yearly rent, as had been received for the premises within twenty years then last past, will not be obliged to let the lands at a rack rent, but may demise them, reserving the usual fines and rent; as a lease at a rack rent may be inconsistent with the nature of the estates.

Right v. Thomas,
3 Burr. 1447.

§ 49. It is not only necessary to reserve the ancient rent, but it must also issue out of the same lands, from which it was formerly reserved: for where two distinct farms are joined together, the whole rent which is reserved out of both, is a new rent, and not the ancient accustomed rent.

5 Rep. 56.
3 Rep. in
Cha. 56.

§ 50. Where a power required that two-thirds of the improved value should be reserved as a rent, the reservation might formerly have been made in the terms of the power; but, in general, it seems necessary, that the precise sum intended to be reserved, should be specified in the lease; for, otherwise, the remainder-man may be put to infinite trouble and expence

Clere's Case,
6 Rep. 17.
4th Point.

1 Vent. 338.

pence, in proving the value of the lands demised, of the *quantum* of the ancient rent.

Hamilton v.
Mordaunt,
6 Bro. Parl.
Ca. 145.

§ 51. In a settlement made on the marriage of Lord *Brandon*, eldest son of the Earl of *Macclesfield*, a power was given to the successive tenants for 99 years; determinable on their lives, to lease all the premises, so as, upon every such lease of such parts of the premises as had been anciently and accustomably demised, whereof fines had been usually taken, the old usual and accustomed yearly rent or rents, or more, should be yearly reserved and made payable; and so as upon every lease of such part of the premises as had not been usually let, and for which there had not been any fine or fines usually taken, there should be reserved and made payable the most and best improved yearly rent that could be reasonably had or obtained for the same.

A tenant in possession for 99 years under the settlement, being desirous to make leases for the benefit of his family, and seized with a sudden indisposition, when he had no rent-rolls or old leases, made a lease by indenture, of all the lands which had been usually letten, and fines taken for the same, yielding and paying *the several and respective old accustomed rents reserved and payable for the same*; and also another lease, whereby part of the premises, for which fines had not been usually taken, and of which there was then no lease, or for any life in being, were leased, yielding *um* and sums of money, as should amount to and best improved yearly rent that could be reasonably,

reasonably had and obtained for the same. A question having arisen on the validity of these leases, the latter of them was given up by the lessees, a reservation of the most improved rents being so uncertain, that it could not be supported. And as to the former, after a hearing before Lord Chancellor *Cowper*, assisted by the Chief Justices *Holt* and *Trevor*, it was held not to be warranted by the power, contrary to the opinion of *Holt*.

On an appeal to the House of Lords, it was said on the part of the appellants, that the objections made at the hearing to the validity of the lease, were, first; That it ought to have mentioned the particular rent reserved; secondly, That the ancient and accustomed rent was thereby reserved, as well for lands not anciently leased, as for those that were. As to the first objection, it was argued, that the specifying a certain sum in the reservation of a lease was clearly not necessary, if the particular rent intended might be known by proper reference; *id certum est quod certum reddi potest*, was an undoubted maxim, both in law and reason.

What those ancient rents were, was a matter of fact capable of being known, and without difficulty, by those who had the writings of the estate. That the reservation was in the same terms with the power, and, consequently, was pursuant to it. That the plain meaning of the restriction in this power, was to secure the ancient rents to the remainder-man; if he had these, he had all that was intended him, and there could

could be no doubt but he would be entitled to them by this reservation. As to the other objection, it was argued, that the demise in the words of it was several; that the reservation of the several and respective ancient rents, for the several and respective messuages, &c. could not mean any thing but such rent for each tenement, as was anciently reserved for the same, and it would be difficult to use plainer and stronger words to import the meaning; that the words *yielding therefore* must be understood *reddendo singula singulis*, and which method of interpretation the law prescribes in many instances, not so strong as this; so that, as to those parts of the estate demised, if there was any which had no ancient rent, no rent was reserved by this reservation, and, consequently, as to those, the power was not executed.

On the other side, it was insisted, that as to the lease, upon which the rent reserved was mentioned to be *the most improved rent*, this reservation was plainly void, for the absolute uncertainty of it, consequently, that lease was not warranted by the power, and was accordingly given up at the hearing. And as to the other lease *under the several and respective old and accustomed rents reserved and payable for the said premises*, this was also void, as against the remainderman, and not warranted by the power; because there being many farms, and a great estate within this one lease, some let at the ancient rents, and some not, it would put insuperable difficulties upon the remainderman to recover his rent; for that, in the action and avowries to be made for the rent, he must be so lucky

as to point out what was the old rent, for what and for how much land it was paid, and at what times payable: and if the tenant could prove that a different rent was paid for the land, or that any other land was comprised in the lease, or that the rent was formerly payable at any other day, the remainder-man could not recover; but, instead of recovering the rent, must from time to time pay him costs; whereas it was intended, that the remainder-man should have as plain, certain, and easy a remedy for his rent, as other landlords have. But, upon the lease in question, it neither appeared what the rent was, which the remainder-man was to have, nor for what estate the rent was to be paid, nor when, or on what days it was to grow due, the lease giving the remainder-man no manner of light as to those particulars. That as these powers of leasing are generally reserved in all settlement, if so loose an exercise of them should be allowed to the tenant for life, it would introduce the greatest difficulties, and put the greatest hardship upon the jointress, sons, and other persons claiming in remainder under such settlements; and, by such a construction, the tenants for life, by an uncertain, general, and short lease of the whole estate, which might be a rash and sudden act, and done with very little expence of money, time, or trouble, would be enabled to render the remainders, though settled on the highest consideration, of very little value, because the persons to whom such remainders belonged, would be in a great measure disabled from recovering any rent.

After

After hearing the opinion of the Judges, the decree was affirmed.

Cumberford's
Case, ante
l. 15.

§ 52. Where lands have never been demised at all, and a power is given to lease them, reserving such rent as was reserved for them within the two preceding years, a lease may be made of them, reserving any rent that the lessor pleases.

6th, As to
the Clauses
and Cove-
nants.

§ 53. The sixth restriction usually inserted in powers of leasing, relates to the clauses and covenants directed to be inserted in such leases. And it is a general rule, that all those clauses, covenants, and reservations required by the power, must be inserted; otherwise the lease will be void against the remainder-men and reversioner.

Earl of Car-
digan v.
Montague,
cited 1 Burr.
Rep. 122.

§ 54. The Duke of *Montague* was tenant for life, with power to lease, reserving the ancient usual and accustomed rents, heriots, boons, and services. In the former leases, the tenants covenanted to keep in repair, and that covenant was omitted.

The Lord Chancellor was of opinion, that the covenant was a boon, and beneficial to the remainder-man, and held the leases void for want of it. He took some days to consider, and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon, was, that the estate must come to the remainder-man in as beneficial a manner as ancient owners held it.

§ 55. The

§ 55. The omission of a covenant for payment of rent, will also vitiate a lease, made under a power; for a mere reservation of rent does not make it payable until entry, and therefore it, in fact, may not be payable during the term. Besides, if there be no covenant to pay the rent, it may be assigned to a succession of beggars.

1 Burr. Rep. 125.

§ 56. The omission of a clause of re-entry, will also invalidate a lease of this kind; for, if such a clause be not inserted, the ground may be unoccupied, without a sufficient distress upon it; so that the remainder-man can neither have his rent, nor his land.

§ 57. A person having a leasing power, reserving usual and reasonable covenants, demised a house to *William Sandham*, with a proviso, that in case the premises were blown down, or burned, the lessor should rebuild them, otherwise the rent should cease. The jury found, that this was an unusual and unheard of covenant, on the part of the lessor; and it was adjudged that the lease was void.

Doe v. Sandham, 1 Term Rep. 705.

§ 58. If, however, the covenants in a lease made under a power, be, upon the whole, such as place the parties upon the same footing, as under former leases, their differing in trifling circumstances will not invalidate the lease.

§ 59. In the case of *Goodtitle v. Fumucan*, it was objected, that the covenants in the lease were not so beneficial to the remainder-man as those in the ancient

Ante f. 38.

leases; by one of which, the tenant covenanted to pay half the land tax, and, by the other, the lessor covenanted to free the tenant from tithes, and all church dues; whereas, in the former leases, the tenants covenanted to pay all duties and taxes, except the land tax: church dues were, by law, particularly chargeable upon the occupier. The court said, the power did not mention covenants, and that, what was thrown on the landlord, was compensated by what was paid by the tenant.

In what
Conveyances
leasing
Powers may
be inserted.
2 Rep. 176 b.
Poph. 81.
Cro. Jac. 181.
Jenk 247.

§ 60. It is laid down in *Mildmay's* case, that although a power of leasing may be reserved in a declaration of uses of a fine or recovery, yet that no such power can be reserved in a bargain and sale, or covenant to stand seised; for, as uses may be raised on a fine or recovery without any consideration, therefore a use will arise to the lessees without consideration, and the former estates being raised without consideration, may be defeated without consideration. But as no uses can arise on a bargain and sale or covenant to stand seised without consideration, therefore no use can arise to the lessees; for, where the persons are altogether uncertain, and the terms unknown, there can be no consideration; so that the former estates which were raised upon consideration, cannot be defeated by such leases.

1 Rep. 176.
Baynes v.
Belfon,
T. Raym.
247.

§ 61. This principle seems to be much too general, nor is it warranted by *Mildmay's* case, which is universally cited as an authority to support it. That case was thus: A person having three daughters, cove-
nanted

nanted to stand seised to the use of himself for life, remainder to the use of his daughters in tail, with a proviso, that it should be lawful for the covenantor to limit any part of the lands to any person or persons for any life or lives, or years, for the payment of his debts, performance of his legacies, preferment of his servants, or any other reasonable considerations. The covenantor, by his will, limited a considerable part of the premises to one of his daughters for a hundred years, without reserving any rent, and it was resolved, that this power was void in its creation.

§ 62. Now, as the lease in *Mildmay's* case was made without any consideration, it does not follow, from the determination in that case, that those powers of leasing which are given in modern settlements, may not be valid, though inserted in a bargain and sale, or covenant to stand seised, as it is always required that the best and most improved rent should be reserved. And Lord *Mansfield* has said, that a lessee at a rack-rent is a purchaser for a valuable consideration, and that powers of leasing were equally beneficial to the tenant for life and the remainder-man.

Doug. 22.
Black. R.
1019.

§ 63. Where a tenant for life makes a lease not warranted by his power, it is absolutely void, as to the person in remainder or reversion, and not merely voidable.

Where the
Power is not
well execut-
ed, the Lease
is void.
Doe v. Watts,
7 Term R. 83.

TITLE XXXII.

D E E D.

CHAP. XIX.

In what Cases Equity will support a Defective Execution of a Power.

§ 1. *Principles on which this Doctrine is founded.*

2. *Where there is a Consideration.*

11. *Where there is Fraud.*

§ 13. *Where a complete Execution is prevented by Accident.*

14. *But a Non-execution will not be supplied.*

Section 1.

Principles on which this Doctrine is founded.

WE have seen that the courts of law have, in all cases, construed powers strictly, and have required, that every circumstance prescribed, should be complied with. But the courts of equity have assumed a jurisdiction in matters of this kind, and have given relief and supplied a defective execution of powers, in the following instances.

Treat. of Eq.
B. 1. ch. 4. s. 25.

1st, Where there is a consideration, as for payment of debts, or provision for children, and no better on the other side. 2d, Where there is any fraud, or the party is guilty of any deceit or falsehood, by which the execution is prevented, for he in remainder shall not take advantage of his own wrong. 3d, Accident, or an impossibility of complying with the circumstances, since

since it would be unconscionable in the remainder-man to take advantage of these, provided the person having the power does all he can.

§ 2. With respect to the first ground upon which a court of equity will supply a defect in the execution of a power; namely, where there is a sufficient consideration, it has been determined, that a covenant in marriage articles, to settle a jointure, under a power, on an intended wife, was a good execution of such a power; because a wife is considered, in equity, as a purchaser for a valuable consideration, of her jointure, or of whatever else is stipulated, before marriage, for her benefit.

Where there is a Consideration.

§ 3. Lord *Coventry* being tenant for life under his father's will, with a power, by any writing under his hand and seal, to settle any part of the estates comprised in his father's will, not exceeding 500 *l.* a year, on any woman he should marry, for her jointure, so as such wife brought a portion equivalent to such a jointure.

Coventry v. Coventry,
Max. in Eq.
2 P. W. 122.

Lord *Coventry*, in consideration of a marriage and 10,000 *l.* portion, executed articles by which he covenanted, that he or his heirs would, after the marriage, according to his power, or otherwise, by good conveyances, settle lands of the yearly value of 500 *l.* on his lady, for her jointure. Soon after the marriage was solemnized, Lord *Coventry* went to his country seat and delivered the articles to his steward, with direc-

tions to look over his rental, and find out an unincumbered part of his estate, to settle as a jointure.

A part of the estate being fixed upon, and a particular made thereof, a settlement and appointment of it was accordingly drawn and engrossed, and left with Lord *Coventry's* steward for execution. From various circumstances, the execution of this deed was delayed, and Lord C. died without having executed it. On a bill brought by the widow against the remainderman, under the original will, and the personal representatives of Lord *Coventry*, the principal question was, whether the covenant contained in the marriage articles, should be deemed a good execution of the power. Lord Chancellor *Macclesfield*, the Master of the Rolls, Baron *Price*, and Baron *Gilbert*, were clearly of opinion, that the covenant contained in the marriage articles operated, in equity, as an execution of the power, and a charge and lien upon the remainder.

Vide 2 P. W.
233. N. 1.

§ 4. A covenant is also a good execution of a power, when such covenant is entered into for the benefit of younger children : because parents are under a moral obligation to provide for them.

Sarsh v.
Blanfrev,
Gilb. Rep.
166.

§ 5. A person settled lands to the use of himself for life, and then, as to part, to his wife for life, for her jointure, then to the issue male of his own body, with several remainders over; with a proviso, that if he should have any younger children, it should be lawful for him, by deed or will, executed in the presence of two
or

or more credible witnesses, to limit and appoint any of the said lands (except those limited in jointure) to such persons, and for such estates, as he should think fit, for raising 500 l. a piece for younger children, to be paid at such times, and in such manner, as he by such deed or will should declare, and covenanted to do accordingly.

The person to whom this power was given died, leaving several younger children, but did not make any appointment.

It was decreed, that this was a charge upon the lands, and bound the issue in tail; the covenant being looked upon as an execution of the appointment, in pursuance of the power.

§ 6. A power expressly directed to be executed by deed, will be deemed, in equity, to be well executed by a will, where it is in favour of a wife.

§ 7. A husband, by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first and other sons in tail male, with a power to the husband, to make a jointure on his wife, by a deed under his hand and seal.

Tollett v.
Tollett,
2 P. W. 488.

The husband having made no provision for his wife, and, being in the *Isle of Man*, by his last will under his hand and seal, devised part of his lands within his power, to his wife for life.

It was objected, that this conveyance, being by a will, was not warranted by the power, which directed that it should be by deed.

Master of the Rolls.—“ This is a provision for a
 “ wife, who had none before, and within the same
 “ reason, as a provision for a child, not before pro-
 “ vided for; and as a court of equity would, had this
 “ been the case of a copyhold devised, have supplied
 “ the want of a surrender; so, where there is a defec-
 “ tive execution of a power, be it either for payment
 “ of debts, or provision for a wife or children unpro-
 “ vided for, I shall equally supply any defect of this
 “ nature.”

§ 8. Where a power is directed to be executed by a deed, attested by three witnesses, a deed which is only attested by two witnesses, will be deemed good in Chancery, in favour of younger children.

Parker v.
 Parker,
 10 Mod. 467.

Cotter v.
 Laver.
 2 P. W. 623.
 1 Bro. R. 368.

§ 9. *A.* having power to charge lands with 7000 *l.* for younger children, by any writing under his hand, attested by three witnesses, did, (in fear of sudden death and being absent from home, and so not being able to have sight of the deed where this power was contained), by a paper attested by two witnesses, charge his estate with 8000 *l.* instead of 7000 *l.*, and this defect was supplied.

§ 10. It should, however, be observed, that courts of equity will give no assistance, where both parties are volunteers; for where the question, as to the execution

cution of a power, lies between an appointee under a power, without consideration, and a remainder-man, the latter having a vested estate, will clearly be entitled against the former, unless the appointee can show that the interest of the remainder-man is divested by an actual execution of the power in due form,

§ 11. With respect to the second ground upon which a court of equity will supply a defect in the execution of a power, namely, fraud or deceit; as it is one of the principal objects of a court of equity to relieve against fraud and deceit, it has long been established, that where a party interested prevents a strict compliance with the circumstances required in the execution of a power, from immoral motives, there, if the person who has the power does any act that plainly evinces his intention to execute it, such act will, in equity, be deemed a good execution of it.

Where there is Fraud.

3 Cha. Ca.
89. 92. 122.

§ 12. Thus, where the remainder-man gets the deed into his possession, and will not allow the tenant for life to have a sight of it; there the tenant for life may execute conveyances, and though he does not pursue the terms of the power, yet equity will relieve, even in favour of a volunteer, because the remainder-man shall not take advantage of his own wrong, by withholding from the tenant for life, the sight of his power.

Gilb. Cha.
306.

§ 13. With respect to the third ground upon which a court of equity will supply a defect in the execution of a power, namely accident; as it is an object of courts

Where a complete Execution is prevented by Accident.

courts of equity to relieve against all manner of accidents, even in favour of volunteers, it being unconscionable for a remainder-man to take advantage of them; therefore it was agreed in *Bath* and *Montague's* case, that if a man makes a conveyance, with a power of revocation, in the presence of four privy counsellors, and he is sent by the King to *Jamaica*, where that circumstance becomes impossible, there equity will allow him to revoke without it.

But a Non-execution will not be supplied.

§ 14. Although we have seen that a court of equity will, in many instances, aid a defective execution of a power, yet it will never interpose in the case of a non-execution of a power, which always leaves it to the free will and election of the party to whom the power is given, either to execute it or not. And the intervention of death, between a man's resolving to execute a power, and his actually executing it, is not of itself, even in cases where the act is of such a nature as a man is under an obligation to perform, a ground for the interposition of a court of equity, in favour of the person intended to have been benefited by the doing thereof, although some steps be taken towards completing such intention.

Piggot v. Penrice.
Com. Rep. 250.
Arundel v. Philpot,
2 Vern. 69.

§ 15. A feme covert having a power of revocation and appointment, and being sick, wrote a letter to her attorney, who had drawn her settlement, desiring he would prepare a deed to give the inheritance to her niece, and on the back of the letter it was written that the attorney should keep it a secret. The attorney, however, communicated this letter to the husband,

band, and several delays intervened, during which the attorney, having been examined, swore, that when he communicated the letter to the husband, he did not propose any method to the husband, or use any means to prevent the revocation.

The question was, whether this letter amounted to a revocation in equity; and it was decreed that it did not.

§ 16. *A.* having a power of revocation, by any writing under his hand and seal; and being desirous of providing for his daughters, prepared notes in writing, which he declared should have the effect of his last will, and which he called instruments for his counsel to draw up his last will in form. His counsel drew a writing, and had the same ingrossed, leaving blanks for the names of the trustees. *A.* died before he had executed the will. A bill being exhibited by the daughters for the portions given them by these instructions, an issue was directed to try whether these notes were part of the last will of *A.*; and a verdict was given that they were a will; whereupon the Chancellor decreed them to be a good execution of the power.

Smith v. Ashton,
Finch 273.
1 Freem. 308.

§ 17. This case has been cited to prove, that a non-execution of a power will be aided in equity, but it is clear from the circumstance of directing an issue to try whether these notes amounted to a will, that the court did not think the accident of the father's death, before he had completed his intent towards his

Treat. of Eq.
B. 1. ch. 4.
f. 25.

his younger children, a sufficient foundation for relief. It therefore directed a trial to ascertain whether these notes were a will; and it being found that they were, the question then was reduced to this, whether the court could relieve the younger children, in respect that the will wanted circumstances which were required by the power, to attend the execution of it; which, as between the younger children and the heir, it certainly would do, the case being by the verdict a case of a defective execution only.

2 Vern. 465.

§ 18. In the case of *Laffells v. Lord Cornwallis*, the Lord Keeper said, that the Court of Chancery had not gone so far, as where a person had a power to raise money, if he neglected to execute that power, to do it for him; although he thought it might be reasonable enough, and agreeable to equity, in favour of creditors. But in a modern case it was held, that where a person had a power of charging lands with 2000 l., which he never executed, the power could not be considered as assets for payment of debts,

Holmes v.
Coghill,
7 Ves. Jun.
499.

TITLE XXXII.

D E E D.

CHAP. XX.

How Powers may be extinguished and destroyed.

- | | |
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| § 1. <i>A complete Execution.</i>
2. <i>A Release.</i>
3. <i>Fine or Recovery.</i>
4. <i>Bargain and Sale, &c.</i>
5. <i>Powers in Gross not barred by a Conveyance of the Land.</i>
8. <i>Powers to Lease not barred by a Charge on the Land.</i> | 10. <i>Powers collateral not barred by Release or Conveyance.</i>
11. <i>A Power may be merged.</i>
13. <i>A Power may be forfeited to the Crown.</i>
14. <i>In what Cases such Power may be executed.</i>
18. <i>When a Power becomes void.</i> |
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Section 1.

THE first and most obvious mode by which powers, whether relating to the land or collateral to it, may be extinguished, is by a complete execution of them. And it was formerly held, that even a partial execution of a power, operated as an extinguishment of it, but this doctrine is not now held to be law.

A complete Execution.

Zouch v. Woolston, Ante ch. 16, f. 33.

§ 2. Powers relating to the land, whether appendant or in gross, may be barred by a release, to any person, having an estate in possession, remainder, or reversion, in the lands, to which the power relates: for where powers are given to a person having an estate or interest, either present or future, in the land, . the

A Release.
1 Inst. 265 b.

the exercise of such powers is considered as a species of property advantageous to him, and there is no reason why he should not be allowed to depart with, or exclude himself from the benefit of it.

**Fine or
Recovery.**

§ 3. Powers relating to the land may also be barred or extinguished by fine or common recovery; of which an account will be given under titles Fine and Recovery.

**Bargain and
Sale, &c.
1 Inst. 342 b.
s. 1.**

§ 4. Powers relating to the land are also liable to be extinguished or suspended by any of those conveyances, which derive their effect from the statute of uses, and which are said to operate without transmutation of possession; as a bargain and sale, covenant to stand seised, and lease and release; for whoever has any estate in the land, may convey that estate to another, and it would be unjust that he should afterwards be admitted to avoid, or to do any thing in derogation of his own act. Any assurance, therefore, of this nature, which carries with it the whole of the grantor's estate, operates as a total destruction of the powers appendant to that estate; and by parity of reason, any assurance that only transfers a particular estate, such as an estate for life, or a term for years, suspends the exercise of the power, during the continuance of that estate, or at least the estate to be raised by it: and where such assurance only creates a charge upon the estate, it necessarily subjects the estate, created by the power, to that charge.

§ 5. With

§ 5. With respect to those powers relating to the land, which are called powers in gross, as the estates to be created by them, do not fall within the compass of the estate, to which they are said to relate, there does not seem to be any reason why an alteration in that estate should affect them. Hence, if a tenant for life, with power to settle a jointure, conveys away his life estate, by bargain and sale, covenant to stand seised, or lease and release, these conveyances will not affect his power of appointing a jointure. If he should even make a conveyance in fee, by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a right to convey, the power in gross will not be affected by them.

Powers in
Gross not
barred by a
Conveyance
of the Land.

Hard.R.416.

§ 6. But where a tenant for life, with a power to jointure, conveys away his estate by feoffment, to a stranger and his heirs, as this species of assurance not only transfers the estate which the feoffor might lawfully pass, but also a tortious fee, it follows that the whole inheritance is divested, and the seisin out of which the uses created by the power were to be fed, is destroyed, by which means the power becomes extinct.

Idem.

§ 7. Where a tenant for life, with powers of leasing, jointuring, and charging, joins with the remainder man in suffering a common recovery, the conveyance to make a tenant to the *præcipe* ought to be during the joint lives of the tenant for life, and the intended tenant to the *præcipe*; in order to preserve the powers of

1 Inst. 203 b.
n. 1.

of the tenant for life, by leaving the reversion in him.

Powers to
Lease not
barred by a
Charge on
the Land.

§ 8. In some cases, a power of leasing reserved to a tenant for life, will not be extinguished or suspended by his conveyance of the estate, where such conveyance is made only to create a particular charge, and does not amount to a departing with the whole estate.

Ren v.
Bulkely,
Doug. Rep.
292.

§ 9. Lord *Onslow* being tenant for life, under his marriage settlement, with a power to make leases for twenty-one years, reserving the best rent, conveyed all his life estate by lease and release, to one *Briscoe* and his heirs, in trust to apply the profits in payment of an annuity of 150*l.* during the life of Lord *Onslow*, and the surplus to Lord *Onslow* himself.

In the year following Lord *Onslow* conveyed all his estate to trustees for ninety-nine years, if he should so long live, for payment of his debts, but with an express reservation as to all leases granted or to be granted.

Lord *Onslow* afterwards made a lease of the premises in question, for twenty-one years, pursuant to his power, and the question was, whether the conveyance to *Briscoe* destroyed the power of leasing.

Lord *Mansfield* :—“ Powers came into the courts
“ of common law with the statute of uses, and the
“ construction

“ construction of them, by the express direction of
 “ the statute, must be the same as in courts of equity.
 “ The creation, execution, and destruction of them;
 “ depend on the substantial intention and purpose of
 “ the parties. It is said, first, that the grantor in this
 “ case was not in possession, and that it was necessary
 “ he should be to execute the power. But I think
 “ possession here means the receipt of the rents and
 “ profits which were applied to his use. If actual
 “ possession were necessary, a leasing power could
 “ never be executed, where the land is in the hands
 “ of a tenant. Secondly, it is contended that by
 “ granting away his life estate, he extinguished his
 “ power. Certainly where the whole life estate is
 “ conveyed away by the intention of the parties, the
 “ power must be at an end, and cannot afterwards be
 “ exercised to the prejudice of the grantee. But the
 “ conveyance here was only to let in a particular
 “ charge, subject to which the rents and profits still
 “ belonged to Lord *Onslow*, and the lease could not
 “ prejudice the security, nor the remainder man, for
 “ the best rent must be reserved; it would therefore
 “ be contrary to the intention of all parties, to hold
 “ that the power was extinguished, by the conveyance
 “ to *Briscoe*.”

§ 10. Powers collateral to the land cannot be released, nor are they extinguished or destroyed by a feoffment, fine, or recovery; for these powers being given to strangers, they are intended for the benefit of some third person, and therefore the extinction of them is supposed to be injurious to that person. And

Powers collateral not barred by Release or Conveyance. 1 Inst. 265 b. 342 b. n. 1.

although it is a general rule of law, that every person who is a party to a feoffment, fine, or recovery, is thereby estopped from claiming any estate or interest in the lands so conveyed, yet if the donee of a collateral power, conveys the estate, over which the power is given, by feoffment, fine, or recovery, and afterwards executes his power of revocation, it will be good. For the person claiming the estate under the revocation, is in immediately by, and makes his title directly from the original settler: he is not therefore bound or estopped by any act of the person to whom the power is given. Thus, by the old law, if *cestui que use* devised that his feoffees should sell his land, and died, and his feoffees made a feoffment over, yet it was held that the feoffees might sell against their own feoffment, because the power to sell was merely collateral to the right of the land, and the vendee took nothing by the feoffment.

A Power may
be merged.

§ 11. A power given to a person having a particular estate in the land, may be merged by his acquisition of the fee simple.

Crofts v.
Hudson,
3 Bro. R. 30.

§ 12. Thus, where an estate was limited to *John Hay* for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to the survivor of the husband and wife in fee. With a power to the husband, by deed or will, to charge the lands with a rent. There was no issue, and the husband in the lifetime of his wife, by will, reciting the power, devised in execution of his power, and of all other powers, a rent of 100 l., and survived his wife.

Lord *Thurlow* said, the power was merged, but he was also of opinion, that though the power was gone, and the will purported to be an execution of the power, yet as he evidently meant the charge should take place on the estate at all events, it must be sustained as a charge on the estate, out of the interest he had at his death.

§ 13. A power of revocation may in some cases be forfeited to the King, by an attainder for high treason, and by that means become vested in the crown. Thus, if there be tenant for life with power of revocation over the estates in remainder, and such tenant for life is attainted of high treason, his estate for life, and power of revocation, will be both forfeited.

A Power may be forfeited to the Crown. *Gib. Uses*, 146. 2. *Hawk. P. C.* c. 49. s. 26.

§ 14. In such a case, if the execution of the power of revocation, be attended with circumstances inseparably annexed to the person of him to whom the power is given, the King cannot execute such power.

In what Cases such Power may be executed.

§ 15. *Thomas Duke of Norfolk* conveyed his lands to trustees, to the use of himself for life, remainder to the use of *Philip Earl of Arundel* his eldest son in tail, with several remainders over; with a proviso that it should be lawful for him to revoke those uses, by any writing under his proper hand, and subscribed by three witnesses. The Duke was afterwards attainted of high treason, and it was determined, that this power of revocation, although forfeited, could not be executed by Queen *Elizabeth*; because the circumstances prescribed in the execution of this power,

Duke of Norfolk's Case, 7 Rep. 13 a.

Smith v.
Wheeler,
1 Freem 9.
1 Vent. 128.
1 Lev. 279.

were so inseparably annexed to the person of the Duke of *Norfolk*, that no one but the Duke himself could execute them.

§ 16. But if the execution of a power of revocation, be not attended with circumstances inseparably annexed to the person, to whom the power is given; then in case of an attainder for high treason, the power of revocation may be executed by the King.

Englefield's
Case,
7 Rep. 11. 4.
Leon. 135.
Vide 1 Hale
P. C. 246.
244.

§ 17. Sir *Francis Englefield* in the first of Queen *Elizabeth*, left the kingdom by licence from the Queen, and remained abroad beyond the time of his licence. The Queen, by her warrant under the privy seal, required him to return, and upon his not complying, seised his lands. Sir *Francis Englefield* by indenture (sealed at *Rome*) between him and *Francis Englefield* his nephew, covenanted for the advancement of his blood, &c. to stand seised to the use of himself for life, remainder to the use of his said nephew, and the heirs male of his body, remainder to the use of the right heirs of his nephew, with a proviso, that as his nephew was an infant, so that his proof was not then seen, and because the uncle did not think convenient to settle the said inheritance in the nephew absolutely, so long as the uncle should live; therefore, if the uncle by himself, or by any other, should during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uses, then all the uses should be void.

Sir

Sir *Francis Englefield* was afterwards indicted for high treason, for compassing the Queen's death, on which he was outlawed : and in 28 *Eliz.* an act of attainder for high treason was passed against him. Queen *Elizabeth*, by letters patent, reciting the settlement and power of revocation, on tender of a gold ring, appointed two persons to deliver a gold ring to *Francis Englefield*, which he refused.

The question was, whether this tender of a gold ring to *Francis Englefield*, was a good revocation of the uses.

It was argued that the execution of this power was not given to the Queen by the act of attainder, because it was inseparably annexed to the person of Sir *Francis Englefield* ; for although the tender of a ring was a thing that might be done by any person, yet as that circumstance was only a mark of the intention of Sir *Francis Englefield*, which intention must arise from the opinion he himself should form of his nephew's future disposition and conduct, therefore no person but Sir *Francis* himself could direct the tender of the ring : But the Judges held, that the whole force and effect of the power of revocation depended on the tender of the ring, so that the Queen might lawfully execute the power ; and therefore judgment was given for her Majesty.

Lord *Coke* observes, that the counsel of *Francis Englefield* were not satisfied with this judgment, and therefore advised a writ of error ; but at the next

Vide *Hardwin v. Warner*,
2 Roll. R.
393.

parliament a special act was passed to establish the forfeiture in the Queen.

When a
Power be-
comes void.

§ 18. Where there is no object for the execution of a power, it of course becomes void.

Roe v. Dunt,
2 Will. R.
336.

Doe v. Denny,
Id. 337.

Madox v.

Jacklon,
2 Bro. R. 588.

§ 19. Thus, where a person had a power given him by his marriage settlement, to appoint the lands to the children of the marriage, and for default of appointment, then to all the children equally, and there was but one child, an appointment to that child was held to be void, because he took under the limitation in the settlement,

TITLE XXXII.

D E E D.

CHAP. XXI.

Of registering and inrolling Deeds.

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| <p>§ 2. <i>Register Acts.</i>
 5. <i>Circumstances required in Memorials.</i>
 6. <i>Utility of the Register Acts.</i>
 7. <i>An Appointment must be registered.</i>
 9. <i>Registering an Assignment is not a Register of the Lease.</i></p> | <p>§ 11. <i>Registering is not Notice.</i>
 16. <i>Notice takes away the Effect of registering.</i>
 21. <i>But the Notice must be fully proved.</i>
 25. <i>Of inrolling Deeds.</i></p> |
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Section 1.

BY the common law, every deed took place according to the priority of its date or delivery ; in consequence of which, purchasers and mortgagees were frequently defrauded by means of prior conveyances, with which they were unacquainted.

§ 2. To remedy this inconvenience, it has been enacted, that a memorial of all deeds and conveyances of or concerning, and whereby any honours, manors, lands, tenements, or hereditaments, in the county of *Middlesex*, and in the east, west, and north ridings of the county of *York*, may be any way affected in law or equity, may be registered in offices established for that purpose in the county and ridings above mentioned ; and that every such deed or conveyance shall be adjudged fraudulent and void, against any subse-

Register Acts.
2 & 3 Ann,
c. 4. § 1.
5 Ann, c. 18.
6 Ann, c. 35.
7 Ann, c. 20.
8 Geo. 2. c. 6.

quent purchaser, or mortgagee, for a valuable consideration, unless a memorial thereof be registered, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim.

2 & 3 Ann,
c. 4. s. 16,

7 Ann, c. 20.

§ 3. In the statute, which establishes a register in the west riding of *Yorkshire*, there is an exception of copyhold estates, leases at rack-rent, and leases not exceeding 21 years, where the actual possession goes along with the lease. And in the statute, which establishes a register in *Middsex*, there is an exception of copyhold estates, leases at rack-rent, and leases for 21 years, where the actual possession goes along with the lease, and also of chambers in Serjeant's Inn, the Inns of Court, or Inns of Chancery.

§ 4. It is further enacted by the statutes 5 *Ann*, c. 18. s. 4. and 6 *Ann*, c. 35. s. 19., that no judgment, statute, or recognizance, shall affect or bind any honours, &c. in the said county or ridings, but only from the time that a memorial of such judgment, statute, or recognizance, shall be entered at the register office of such county or ridings.

Circumstances required
in Memorials.

§ 5. It is required by these statutes, that the memorials to be registered shall contain the day of the month and the year, when such conveyance or deed bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses, and the places of their abode; and shall express or mention the honours, manors, lands, tenements, and hereditaments

hereditaments contained in such deed, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places within the said county, where any such honours, manors, lands, tenements, or hereditaments, are lying or being, that are given, granted, conveyed, or any way affected or charged by any such deed or conveyance, in such manner as the same are expressed or mentioned in such deed or conveyance, or to the same effect.

§ 6. The utility of the register acts is proved to a demonstration by two facts, namely, that lands in register counties bear a higher price, and money is lent on the security of those lands at a lower rate of interest, than on lands situated in counties where there is no register. It is, therefore, surprising, that the Legislature, with such proof before them, do not extend the register acts to all the counties in the kingdom. The reason usually given, is, that the landholders object to disclose the situation of their estates to the public: but, in point of fact, there is very little disclosure in a memorial drawn according to the rules prescribed by the register acts; as the nature of the deed, its consideration, and uses, need not be stated in the memorial. Nor does there appear to be any necessity for inserting more circumstances in a memorial than those, which are positively required by the register act: for every person, desirous to purchase or take a mortgage of lands situated in the register county, may know to a certainty, by means of a register, what conveyances have been made of those lands which can affect him. And, if he afterwards purchases or advances

Utility of the
Register
Acts.

vances money on them, without requiring the production of those deeds, it is his own fault, and he has no right to expect any redress.

An Appointment must be registered.

§ 7. An appointment under a power, is considered as a conveyance within the register acts; and, if not registered, will be postponed to a subsequent mortgage duly registered.

Scrafton v. Quincy,
8 Ves. 413.

§ 8. The plaintiff came into court under a mortgage deed in *September* 1749, to be paid 500 l., advanced by him to *Thomas Robertson*, and interest, or to have the estate sold and to be paid thereout.

The objection thereto was, that *Robertson* had no power to convey to the plaintiff, because he had before properly conveyed or appointed the premises for the benefit of others; for that, by deed and fine in 1742, this estate was settled to the use of him and his wife, and, afterwards, to such uses as he and she, or the survivor, should by deed or will appoint. This power was, by a deed in 1744, executed by the husband and wife, and appointments were made therein for the benefit of the defendants, who therefore claimed prior to the plaintiff's mortgage in 1746.

It was answered, that the appointment of the uses of that deed and fine could not be set up against the plaintiff, because the premises lay in *Middlesex*, where there was a register act; in consequence of which, this deed of 1744 would be void against the plaintiff, as not being registered till 1748, whereas, his incumbrance

brance was registered in 1746, immediately after the date.

For the defendants, it was argued, that this deed in 1744, was not of such a nature as was required by the statute to be registered: the defendant, therefore, had a prior title.

Master of the Rolls.—Consider the intent and meaning of the act. This case is clearly within the mischief recited: for, here is a person in 1746 lending out his money on land security; and what is to defeat him, is a deed in 1744, prior to him. He is clearly the very person intended; being, by a secret or pocket deed, to be defeated of the incumbrance he has advanced his money for, and taken care to register. He used all due diligence required by the statute, and is, therefore, *primâ facie*, entitled to the relief prayed. Next, consider whether the deed or instrument is of such a nature, as to be within the provision of this act. The words are general, “all deeds and conveyances.” This is undoubtedly a deed; was executed as such, and conveys, so as to affect lands, tenements, and hereditaments; because those claiming under the power, claim under a deed, which, as far as it can operate, affects lands, &c. But it is said, this deed is not to be considered as a separate conveyance, but only as the execution of a power; and that all of it arises under the deed of 1742. If that construction were to prevail, there would be an end of the registry, and of the act of parliament: for, by this means, a secret deed might be set up to defeat him. This, then,

then, being a conveyance actually affecting the lands, though in virtue of a preceding power in another deed, is within the intent of the statute, and, to the most common understanding, such a conveyance as ought to have been registered: otherwise an innocent person, induced to lend his money on land-security, would be defeated. The plaintiff is, therefore, to be considered as a prior incumbrancer.

Registering
an Assign-
ment is not
a Register of
the Lease.

Honeycomb
v. Waldron,
2 Stra. 1064.

9. The registering an assignment of a lease will not operate as a register of the original lease.

§ 10. The defendant claimed under a lease made in 1730 by Lord *Grandison*, which was soon after mortgaged, and, in 1731, sold out and out to the defendant. The original lease was not registered; but the first mortgage of it and the defendant's purchase were. And, it not being a lease at rack-rent, the question was, whether this was a registry within the meaning of 7 *Ann*, c. 20.: and the Chief Justice held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses names, shall be registered; and of this, a subsequent purchaser can have no notice by the bare registry of the assignment; and it is also required, that the original be produced to the officer.

Registering
is not Notice.
2 Atk. 175.

§ 11. It appears to have been the intention of those who framed the register acts, that the registering a memorial of a deed, pursuant to these acts, should operate as notice of such deed to all persons whatever; and that, in all cases of registry, which is a public de-
pository

pository for deeds, and to which any person may resort, a purchaser ought to search, or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law.

The courts of equity have, however, adopted a very different construction of the register acts; and have determined, that the registering a memorial of a second mortgage, is not constructive notice to the first mortgagee, who may, therefore, advance more money on the first mortgage.

§ 12. *A.* lent money on lands, the mortgage being duly registered, and, afterwards, *B.* lent money on mortgage on the same security, and his mortgage was also registered: and then *A.* advanced a further sum on the same lands, without notice of the second mortgage. It was held by Lord Chancellor *King*, that the registering of the second mortgage was not constructive notice to the first mortgagee before his advancement of the latter sums: for, though the statute avoided deeds not registered, as against purchasers, yet it gave no greater efficacy to deeds that were registered, than they had before.

Bedford v. Backhouse,
Rigge on
Regist. 6.

§ 13. *Wrightson* advanced 800 *l.* on a mortgage in *Yorkshire*, and registered his mortgage, and, afterwards, *Hudson* lent a sum of money, and took a judgment for it, which was registered; and then *Wrightson* advanced 270 *l.* more, but without any express notice of *Hudson's* judgment; though it was argued on a bill, brought by *Wrightson* to foreclose, that *Hudson* ought

Wrightson v. Hudson,
Rigge on
Regist. 6.

to redeem upon paying the *first* mortgage : for that, where such registers prevail, every incumbrance should be satisfied according to the priority of its registry ; and that the registering of *Hudson's* judgment was a constructive notice to *Wrightson*, sufficient to deprive him of the common benefit of a court of equity, whereby a first mortgagee without notice is to hold, till subsequent incumbrances are discharged.

Yet it was resolved, that these statutes avoid only prior charges not registered, but did not give subsequent conveyances any further force against prior ones registered, than they had before. That, to have affected Mr. *Wrightson*, *Hudson* ought to have given him notice when he advanced his money, and that though *Wrightson* might have searched the register, he was not bound to do it : and, therefore, it was decreed, that *Hudson* and the mortgagor should be foreclosed, unless they paid off both plaintiff's securities.

Morecock v.
Dickins,
Amb. 678.

§ 14. One *Wilson* being indebted to *Morecock*, and having taken a new lease of some lands, it was agreed by deed, that the lease should stand as a security for 800 l. and interest ; and the deed was registered. *Wilson* afterwards mortgaged the premises comprised in the lease to *Dickins*, for 800 l., and delivered him the lease.

Dickins had no notice of *Morecock's* security at the time he took the mortgage. *Wilson* became a bankrupt ; and *Morecock* filed his bill to be paid the money, agreed to be secured on the premises, prior to *Dickins's* mortgage.

mortgage. *Dickins* filed his bill to be paid his mortgage money, or to foreclose.

The question was, whether *Dickins* (though he had not actual notice of *Morecock's* security, at the time he took the mortgage) should be affected by a constructive notice, arising from the circumstance of the deed being registered at the time.

It was admitted by the counsel for *Morecock*, that *Dickins* having got the legal interest, would be entitled to priority, unless he could be affected by notice. That there was no evidence of actual notice: but it was insisted, that the registration was notice of itself; that, to give the register acts its proper and intended effect, the act of registration ought to act as notice; and it was compared to the case of judgments, of which that first docketed shall have priority. On the other side, it was argued for the defendant *Dickins*, that the registry act was made for one single purpose, to give preference to a purchase-deed registered, to a prior deed not registered: but the act gives no greater efficacy to deeds which are registered than they had before; and the case of *Bedford v. Backhouse* was cited for that purpose. That, in the present case, *Dickins*, having got the legal estate, was entitled to be paid before a prior equitable incumbrancer, unless he was affected by notice. That there was no actual notice; and the registration was not constructive notice, according to the above determination.

Lord

Lord *Camden*, Chancellor.—The question is, whether registration is presumptive notice to all mankind. If this was a new point, it might admit of difficulty; but the determination in *Bedford v. Backhouse*, seems to have settled it, and it would be mischievous to disturb it. The act provides for one single case only, that is, to make unregistered deeds void against registered deeds; but there is no provision by the act in a case where all the deeds are registered. And yet it becomes a serious question, whether a court of equity should not say, that in all cases of registry, which is a public depository for deeds, and to which any person may resort, a subsequent purchaser ought not to search or be bound by notice of the registry, as he would of a decree in equity, or a judgment at law. It is a point in which a great deal of property is concerned, and is a matter of consequence. Much property has been settled, and conveyances have proceeded, upon the ground of that determination. In the case of *Vandebendy*, in the House of Lords, the doctrine about dower prevailed; because it had been practised in a course of conveyance. A thousand neglects to search have been occasioned by that determination, and, therefore, I cannot take upon me to alter it. If it was a new case, I should have my doubts; but the point is closed by that determination, which has been acquiesced in ever since.

Tit. 12. c. 3.
¶ 23.

Williams v.
Sorrell,
4 Ves. Jun.
389.

§ 15. In a modern case, it has been determined, that the registering an assignment of a mortgage is not notice.

§ 16. The

§ 16. The courts of justice have, in another instance, considerably weakened the operation of the register acts, by laying it down as a rule, that, where a subsequent purchaser, whose deed is registered, had notice of a prior incumbrance at the time of his purchase, although the deed, by which such prior incumbrance was created, be not registered, such prior incumbrance shall, notwithstanding, take place of the deed so registered: for the object of the register acts being to give notice to subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of a prior conveyance, then it is not a secret conveyance by which he can be prejudiced, but he is in the same situation as if these acts had never been made: for his notice of the prior conveyance is as strong as if it had been registered, and it is his own folly if he proceeds in his purchase.

Notice takes away the Effect of registering.

Cowp. R. 712.

§ 17. The first case on this subject arose in *Ireland*, where there is a general register act, similar to those which have been mentioned. Lord *Granard* being tenant for life, remainder to his first and other sons, with power of leasing, granted a lease for three lives, at the rent of 30 *l. per annum*; but it was not registered. His Lordship, being greatly in debt, came to an agreement with Lord *Forbes* his eldest son, by the agency of Mr. *Stewart*, to sell him his life estate, upon Lord *Forbes* paying his father's debts, and securing him an annuity, and a jointure to his wife. The estate was accordingly conveyed to two persons, in trust for Lord *Forbes*: and it was proved that, during the treaty for the purchase, Mr. *Stewart*, Lord *Forbes*'s agent,

Lord Forbes v. Deniston, 4 Bro. Parl. Ca. 189.

Vide 3 Atk.
653.

had notice of the lease. The conveyance to the trustees being registered, they brought an ejectment against the lessee, and obtained judgment. The lessee applied to the Court of Chancery; and, upon proving that *Stewart* had notice of this lease at the time of the purchase, the Lord Chancellor decreed, that a perpetual injunction should be awarded against Lord *Forbes* and his trustees. From this decree, there was an appeal to the House of Lords of *England*, where it was reversed as to part; the injunction being restrained to the life of Lord *Granard*, but, as to the principal point, the decree was affirmed.

Blades v.
Blades, 3 Ab.
Eq. 358.

§ 18. So, where *William Blades* had devised certain lands to his wife for life, and, after her death, to his children. The wife entered, but did not register the will. Afterwards, the heir at law mortgaged the estate, and the mortgagee got the deed registered; and, upon a bill brought against him, denied notice of the will, but it was proved that he had notice.

The court declared, that his notice of the will, though it was not registered, bound him; and that his getting his own purchase first registered was a fraud; the design of these acts being only to give the parties notice, who might otherwise, without such register, be in danger of being imposed on by a prior purchase or mortgage, of which they are in no danger, when they have notice thereof in any manner, though not by the registry: and that they would never suffer an act of parliament, made to prevent fraud, to be a protection to a fraud.

§ 19. A person

§ 19. A person purchased a term for years in the county of *Middlesex*, knowing that it was chargeable with the payment of an annuity of 40 l; and, having registered his own conveyance, he refused to pay the annuity, because it was not registered. The Court of Exchequer was of opinion, that the purchaser was liable to the annuity, although it was not registered, for the statute only intended to give such notice of former incumbrances to purchasers, that they might not thereby be defrauded. But, if a man knows of his own knowledge, that there is a prior incumbrance, and, notwithstanding that knowledge, becomes a purchaser, the statute never was intended to relieve such a person, though the first incumbrance was not registered; for, where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience; and, therefore, his purchase will never be established in a court of equity.

Cheval v.
Nicholls,
1 Stra. 664.
3 Atk. 654.

§ 20. The last case which has been reported on this subject, was determined by Lord *Hardwicke*, and is thus stated by Mr. *Forrester*.

The defendant, *Edward Le Neve*, (father of the plaintiffs), in 1718, being possessed of leasehold estates in *Kent* and *Middlesex*, upon his marriage with his first wife, mother to the plaintiffs, in consideration thereof, and of the estate she was possessed of, by articles, covenanted to settle his leasehold estates upon trustees and their heirs, in trust for himself during his life; then, as to so much of the premises as would amount to the yearly value of 250 l., to *Henrietta* his intended wife

Le Neve v.
Le Neve,
Forrest.
MSS.
3 Atk. 646.
1 Ves. 64.
Amb. 436.
S. C.

for life, and as to the surplus, for the maintenance of the issue; and, after her decease, in trust as to the whole, for the issue of the body of *Edward Le Neve* by *Henrietta* his wife, in such manner as he should by deed or will appoint; and, in default of issue, in trust for himself *and his heirs*. In June 1719, a settlement was made in pursuance of these articles; but neither articles nor settlement were registered, pursuant to the 7th *Ann*, ch. 20. for registering deeds in *Middlesex*.

The defendant, *Edward*, had issue by his first wife the two plaintiffs; and, after his wife's death, 16th November 1719, he, in consideration of an intended marriage with the defendant *Mary*, settled the same estate on *Norton* and *Dandrige*, two trustees, in trust for himself for life; then, as to so much as would amount to 150 *l. per annum*, to *Mary* his intended wife for life; and then to the issue of the marriage. A settlement was made, January 20th, 1743, pursuant to these articles, and both articles and settlement were registered pursuant to 7 *Ann*, c. 20.; but, previous to the articles, *Norton*, (one of the trustees), who was an attorney, and trusted by both parties in preparing the settlement, had a copy of the articles made upon the first marriage, to take counsel's opinion upon.

The plaintiffs brought their bill against *Edward Le Neve* and *Mary* his second wife, and the trustees in the second articles and settlement, and against some mortgagees of *Edward Le Neve*, to set aside the second articles and settlement, upon account of notice of the first

first to the trustee, and to have the estate disincumbered from the mortgages made by *Edward Le Neve*.

The court, after having taken time to consider the case, now gave judgment.

Lord Chancellor.—The general question in this case is, whether there appears a sufficient equity for the plaintiffs to set aside the second settlement, and to get the better of the legal estate; which, by the registry act, is vested in the trustees of that settlement, for want of registering the first articles and settlement. This wholly depends upon the point of notice, and is properly to be divided into three questions. 1st, Whether it appears, that *Norton* was attorney or agent for *Mary Le Neve*, the second wife; 2dly, Whether notice to *Norton* be sufficiently proved according to the rules of this court; and, 3dly, Whether, if both these appear, there be sufficient to postpone the second articles and settlement, and to give priority to the first, notwithstanding the registry act.

As to the first question, it depends on the admission in Mrs. *Le Neve*'s answer, wherein she denies notice of the former settlement; but this amounts to no more than a denial of personal notice: and she says, that *Norton* was attorney or agent for her husband, but that she consented he should prepare the marriage articles, she having confidence in him upon her husband's recommendation. Now, if she confided in *Norton*, it is not material upon whose recommendation it was; nor is it material whether he was, or was not, employed by

her husband. There are two cases, as to this point of notice, determined by Lord *Cowper* : one is *Brotherton v. Hatt*, 2 *Vern.* 574., where it was held, that notice to the scriveners, who were agents for all the lenders upon an estate, was sufficient notice to the parties. The other is *Jennings v. Moore*, 2 *Vern.* 609., where one *Blincorne* having purchased a copyhold estate, (with notice of an incumbrance by surrender, which had not been presented at the next court, and so void by the custom of the manor), and taken the surrender in the name of *Moore*, who paid the consideration money, and agreed to become the purchaser ; this notice to *Blincorne* was determined to be sufficient notice to *Moore*, and he was decreed to pay off the incumbrance ; though it appeared that he did not employ *Blincorne* to purchase for him, or knew any thing of the incumbrance, till after *Blincorne* had agreed and taken the surrender in his name ; but, his approving the purchase afterwards, made *Blincorne* his agent *ab initio*. These cases prove it not to be material by whom *Norton* was originally employed, if he was trusted by Mrs. *Le Neve*.

As to the second question, it was objected for Mrs. *Le Neve*, that, notice being denied by her answer, and proved only by one witness, it is not, therefore, proved sufficiently within the rules of this court. But I take the rule of the court, that, where a fact is denied by an answer, it must be proved by more than one witness, to hold only where the answer contains an absolute denial of the same fact, which is proved by the witness ; but, where there is any difference between the facts,
the

the rule does not prevail. In this case, the denial is only general; whereas, the bill charges notice to *Norton* and *Dandridge*, the trustees. This general denial amounts only to a denial of personal notice to herself, and is a kind of negative pregnant, which may be consistent with notice to her agent. *Norton*, the trustee, being examined for the plaintiffs, proves, that a copy of the first articles was delivered to him, to take counsel's opinion upon, which was probably on occasion of the second settlement; and I take this to be a sufficient proof of notice within the rule of this court.

The third and principal question is, whether the second articles and settlement shall be postponed to the first, notwithstanding the legal estate vested by the registry of the act, by reason of the notice; which I shall consider whether sufficient or not for that purpose, first, if it had been personal; 2dly, as the case is, where notice was given to the agent. The question is of great extent, and depends on the construction of 7 Ann, c. 20. By the recital in the preamble of that act, it appears, the intent was, to secure purchasers against *prior and secret conveyances and fraudulent incumbrances*; so that the mischief, intended to be obviated by the act, arose only in respect of the secrecy of former incumbrances. But, if a person has notice of a prior incumbrance, it cannot be secret as to him. It was said, that this act intended to establish a particular kind of notice, *viz.* by registering the conveyance; but this is only with regard to the legal estate, and the act does not take away the equity of the prior incumbrancer, but leaves the question still open as to him;

him; and the subsequent purchaser, if he had notice, can be in no danger from a *secret* conveyance. The present case has been properly compared to that of the inrolment of bargains and sales within 27 Hen. 8.; which act, though not in the same words, is to the same effect as that under consideration. Now, upon that act, if there be a prior bargainee, whose deed is not inrolled, and a second, whose deed is properly inrolled, if this last had notice of the prior deed, the prior shall prevail in equity; and, if he has any other conveyance, as a feoffment, or a lease and release, the first vendee shall likewise prevail at law. I consider this registry act upon the same footing as the 27 Hen. 8., and that it shall control only the legal estate. The case put at the Bar, that if a man employs an attorney to register his deed, which he neglects to do, and, afterwards, gets another conveyance of the same estate, which he registers, the first deed shall prevail, is material: so, if another person, not an attorney, purchases with notice of a prior incumbrance. These cases, though clear, and stronger than the present, shew that there may be relief in equity, notwithstanding the registry act.

Ante f. 17.

The case of Lord *Forbes v. Dennison*, in the House of Lords, 23d February 1722, which came from *Ireland*, where there is an act for a general register, is applicable to this question. There, the late Earl of *Granard* had made a lease, which was not registered pursuant to the *Irish* act: he and his son, the Lord *Forbes*, afterwards made a subsequent conveyance to the use of Lord *Forbes*, &c. which last was duly registered, and carried the

the legal estate ; but an agent of Lord *Forbes* had notice of the lease before this conveyance. This cause was twice heard in *Ireland* ; on the last of which hearings before Lord *Middleton*, 17th *February* 1721, he decreed a perpetual injunction against Lord *Forbes*, to restrain his proceeding against the lessees under the lease which was not registered. On hearing the cause in the House of Lords, *February* 1722, the decree was reversed ; because Lord *Forbes* disputed his father the Earl of *Granard's* power of leasing for any longer term than during his life. The Lords, therefore, adjudged, that all proceedings against the lessees, (except for breach of covenants), should be stayed during the Earl of *Granard's* life, and then Lord *Forbes* to be at liberty to try his right ; so that they gave the lessees full relief as to the registry act, though the other question, as to Lord *Granard's* power of leasing, was still left open. In *Blades v. Blades*, before Lord *King*, 2d *May* 1727, (*Eq. Ca. Abr.* 358.), a mortgage from an heir at law, who had notice of a will whereby the estate was devised to another, was decreed fraudulent and void against the devisee, though the will was not registered ; which I the rather cite, because Lord *King* generally adhered to the law as much as any person that has sat in this court. There was a case of *Chivall v. Nicholls* and *Hall*, in *Scacc.* in Lord Chief Baron *Gilbert's* time, where relief was given against the registry act, upon equitable circumstances ; which I mention only as a general authority, that equity may prevail against this act, without taking notice of the particular state of that case, where actual fraud was charged. But that of *Blades v. Blades* went merely on the poi-

Ante l. 18.

Ante l. 19.

of notice; and, in that of Lord *Forbes*, there was notice only to the agent. All these authorities prove, that the taking a legal conveyance, after notice of a former, is, in itself, a species of fraud, and takes away the *bona fides* of the subsequent incumbrancer, and puts him in *mala fide*: for, though he knew the first conveyance was not legal, yet he knew that the grantor's conscience was bound by it; and this is within the definition of *dolus malus* by the civil law, *Dig. L. 4. Tit. 3. de Dolo Malo, L. f. f. 2.*; where *Labeo* defines it, *omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitam*. This is the true ground of the determinations in all cases of notice.

If this be so as to notice in general, we are next to consider, whether notice to the attorney or agent be sufficient. Now, if the ground of the determination be *mala fides*, it is all one, whether it be in the party, or in the agent. It is proved by *Norton*, that the first articles were put into his hands to advise with counsel; and it is objected, that this may have been a fraud in *Norton*, in collusion with the husband, upon the defendant Mrs. *Le Neve*. This may be the case; but who ought to suffer but the party that trusted *Norton* the agent, and not those who did not trust him? In the case cited of *Brotherton v. Hatt*, it is probable the subsequent mortgagee was imposed upon; and so, probably, was the purchaser in *Moore v. Jennings*: and, if I should determine this not to be a good notice, it would overturn all the cases of notice to the agent, who, probably, in all those instances, imposed upon
his

his principal. Here, *Norton* was a trustee, and privy to the whole transaction; and I am, therefore, of opinion, that, both as agent and trustee, notice to him was good notice to the party; and that this is sufficient to take the case out of the registry act.

The next point is, what relief I shall give the plaintiffs. Their interest is only contingent; being given them in such manner as *Edward Le Neve* shall by deed or will appoint, and no direction how the estate shall go for want of appointment, but only in default of issue, to *Edward* and his heirs; so that, if the plaintiffs should die without issue in their father's life, their representatives will be entitled to nothing. But, notwithstanding this, I think the plaintiffs entitled to some relief, as the other part of this contingency may happen; and shall decree a conveyance to the uses in the first articles.

As to the mortgagees, the bill must be dismissed with respect to them.

But the plaintiffs are entitled to a decree against the father to disincumber the estate.

Decreed accordingly.

§ 21. But unless notice of a prior deed or incumbrance be fully proved, and there appear to have been some fraud, the Court of Chancery will not give any relief.

But the Notice must be fully proved.

§ 22. A bill

Hine v.
Dodd, 2 Atk.
275.

§ 22. A bill was brought by a judgment creditor to be let in upon an estate of one *Proof* and his wife, in *Middlesex*, preferably to the defendant, who was mortgagee of the same estate, upon a suggestion, that the defendant had notice of the judgment before the mortgage was executed, and, likewise, to enquire into the consideration of the mortgage.

The judgment was entered upon the 12th of *March* 1733, but not registered till the 12th of *June* 1735.

The mortgage was made the 24th of *May* 1735, and registered *June* the 2d 1735.

Lord Chancellor.—This case depends upon the notice the defendant had of the judgment, before his mortgage was registered. The register act, the 7th of *Ann*, c. 20., is notice to the parties, and a notice to every body; and the meaning of this act was, to prevent parol proofs of notice, or not notice. But, notwithstanding, there are cases where this court have broke in upon this, though one incumbrance was registered before another; but it was in cases of fraud: the first was an *Irish* case in the House of Lords, the next was a *Yorkshire* cause before Lord Chancellor *King*. There may, possibly, have been cases upon notice divested of fraud, but then the proof must be extremely clear.

But though, in the present case, there are strong circumstances of notice before the execution of the mortgage, yet, upon mere suspicion only, I will not overturn

overturn a positive law. His Lordship having observed upon the evidence, that there was barely the evidence of a defendant's confession, in contradiction to his answer, and contrary to a positive act of parliament, made to prevent any temptation to perjury from contrariety of evidence. But what weighed principally with him, was the great danger of overturning an act of parliament, and making it mere waste paper. To be sure, apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of parliament. His Lordship, therefore, decreed, so far as the plaintiff's bill sought relief, by postponing the defendant's mortgage to the plaintiff's judgment, that it should be dismissed with costs.

§ 23. In a modern case, a registered conveyance of premises in *Middlesex* for valuable consideration, was established against a prior devise not registered; the evidence of notice, which ought to amount to actual fraud, not being sufficient. And the Master of the Rolls said, he regretted that the statute had been broken in upon by parol evidence; and was very glad to find that Lord *Hardwicke*, in *Hine v. Dodd*, said, nothing short of fraud would do.

Jolland v. Stainbridge,
3 Ves. Jun.
478.

§ 24. Nothing would contribute more to the security of real property than the establishment of a register for deeds in every county in *England*, with a clause, that the registering a memorial of a deed, should in all cases operate as notice of such deed; and
that

Vide 1 Inst.
290 b. n. 1.
f. 11.

that no averment should be admitted at law, or in equity, that a person claiming under a deed which was registered, had notice of a preceding unregistered deed.

Of inrolling
Deeds.

§ 25. It is a common practice to inrol deeds for safe custody; that is, to get them transcribed upon the records of one of the King's Courts at *Westminster*, or of the Court of Quarter Sessions.

§ 26. Every deed, before it is inrolled, must be acknowledged to be the deed of the party, before a judge of the court in which it is to be inrolled, or before a Master in Chancery, if intended to be inrolled in the Court of Chancery. This acknowledgment is signed by the Judge or Master in Chancery, before whom it is acknowledged; and such signature is the officer's warrant for inrolling the deed.

2 Lilly's P.
Reg. 69.

§ 27. The inrolment of a deed does not make it a record; but it thereby becomes a deed recorded: for there is a difference between a matter of record, and a thing recorded to be kept in memory. A record is the entry in parchment of judicial matters, controverted in a court of record, and whereof the court takes notice: but an inrolment of a deed is a private act of the parties concerned, of which, the court takes no cognizance at the time when it is done.

2 Freem.
Rep. 259.

§ 28. Where deeds are inrolled for safe custody, the inrolment is evidence only against the party who sealed the deed, and all those claiming under him.

TITLE XXXII.

D E E D.

CHAP. XXII.

How Deeds may be avoided.

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| <p>§ 1. <i>Disclaimer.</i>
 3. <i>Erazure or Interlineation.</i>
 7. <i>Breaking off the Seal.</i>
 9. <i>Cancelling.</i>
 13. <i>When Usurious.</i>
 16. <i>Of the Statutes 13 and 27 Elizabeth.</i>
 18. <i>What Conveyances are within these Statutes.</i>
 19. <i>Deeds made with Intent to defraud Creditors and Purchasers.</i>
 24. <i>Notice is immaterial.</i>
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 33. <i>Conveyances for a good Consideration only.</i>
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 81. <i>Equity avoids Deeds obtained by Fraud.</i>
 87. <i>Or made in Derogation of the Rights of Marriage.</i></p> |
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Section 1.

DEEDS may be avoided in several ways, and for several reasons. Thus, in the case of a deed poll the grantee may disclaim the estate intended to be given to him, in which case no estate will vest in him. But in the case of an indenture, if the grantee executes it, he thereby accepts of the estate limited to him.

Disclaimer.
 Bro. Ab.
 Done. pl. 7.
 Disclaimer,
 pl. 54. Joint-
 tenant, pl. 57.

3 Rep. 26 b.
Smith v.
Wheeler,
1 Vent. 130.

§ 2. It should, however, be observed, that a disclaimer of a freehold estate must be in a court of record, because a freehold shall not be divested by bare words in *pais*; but in the case of terms for years, which are only chattels real, the assignee of them may refuse in *pais*, and by such refusal the interest will be divested.

Erazure or
Interlinea-
tion.
Pigot's Case,
11 Rep. 26.

§ 3. A deed may be avoided by erasure or interlineation, and in 12 *Ja.* 1. it was resolved, that when any deed is altered in a part material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, razing, or by drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void.

7 Rep. 27 a.

§ 4. If the obliteration be made by the party who owns the deed, although it be in a part not material, or that it is to the advantage of the other party, and to his own disadvantage, yet the deed will be rendered void. But if the alteration be made by a stranger in an immaterial part, without the privity or consent of the owner of the deed, it will not render it void.

Fitzgerald v.
Fauconberg,
Fitz. R. 204.

§ 5. It was held in a subsequent case, that an interlineation, by which a power of sale was enlarged, should be presumed to have been made at the time of the execution of the deed, and not after; if nothing appeared to the contrary.

§ 6. The

§ 6. The modern practice is, when any alteration or rasure is made in a deed before it is executed, to take notice of it in the attestation.

§ 7. It was formerly held, that if the seal of a deed was broken off, or so defaced that no sign or print of it could be seen (unless the person who was bound by the deed, did it,) such deed became void. This doctrine is, however, much altered by more modern determinations: for if it appears that the seal of a deed has been torn off by accident, or destroyed by time, the deed will, notwithstanding, be deemed valid.

Breaking off
the Seal,
Shep. T. 64.
Cro. Eliz. 408.
2 Show. 23.

Nichols v.
Haywood,
Dyer 59 a.

§ 8. The seals of a deed to lead the uses of a recovery were broken off, but it being proved that seals were once annexed to the deed, and that they were torn off by a little boy, and the parts torn off being compared with the deed and the razures agreeing, it was held to be valid.

Argol v.
Cheyney,
Palm. 403.

§ 9. If a deed be delivered up to be cancelled, to the party who is bound by it, and it is accordingly cancelled by tearing off the seals, or otherwise defacing it; or if the person who has the deed cancels it, by agreement with the other party, such deed becomes void.

Cancelling,
Shep. T. 70.

§ 10. But where an estate has actually passed by a deed, the cancelling of such deed afterwards will not divest any estates out of the persons in whom they were vested by the deed.

Hudson's
Case,
Prec. in Cha.
235.

§ 11. A father having quarrelled with his eldest son, made a settlement on his wife of 100 l. a year, in augmentation of her jointure. Afterwards, being reconciled to his son, he cancelled the deed, and so it was found at his death. On a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled.

Bolton v.
Carlisle,
2 H. Black.
R. 259.

§ 12. Where, in setting forth a conveyance, it was stated that a deed of release was cancelled by the releasor's seal being taken off and destroyed, and that part of the deed was lost, with a *profert in curia* of the residue, it was held to be a good pleading: and Lord Ch. Just. *Eyre* said—"I hold clearly that the
" cancelling a deed will not divest property, which
" has once vested by transmutation of possession;
" and I would go farther, and say, that the law
" is the same with respect to things which lie in
" grant. In pleading a grant, the allegation is, that
" the party at such a time did grant, but if by acci-
" dent the deed is lost, there are authorities enough
" to shew, that other proof may be admitted. The
" question in that case is, whether the party did
" grant: to prove this the best evidence must be pro-
" duced, which is the deed, but if that be destroyed,
" other evidence may be received, to shew that the
" thing was once granted; for God forbid that a
" man should lose his estate, by losing his title
" deeds."

When
Usurious.

§ 13. By the several statutes against usury, particularly the stat. 12 Ann. st. 2. c. 16. it is enacted, that

no person shall take, directly or indirectly, for the loan of any monies, wares, merchandises, or other commodities whatsoever, above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time. And that all bonds, contracts, and assurances whatsoever, for payment of any principal money to be lent, whereupon or whereby there shall be reserved or taken, above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void; and the person taking above 5*l.* for the forbearance of 100*l.* for a year, shall forfeit treble the value of the monies, &c. so lent.

§ 14. These statutes do not extend to a purchase of annuities for lives, where the purchaser's principal is, *bona fide*, and not colourably, put in jeopardy, for in that case no inequality of price will make it an usurious bargain. But by the statute 17 *Geo.* 3. c. 26. it is enacted, that upon the sale of any life annuity of more than the value of 10*l.* *per annum* (unless on a sufficient pledge of lands in fee simple) the true consideration, which shall be in money only, shall be set forth and described in the security itself.

§ 15. By the statute 14. *Geo.* 3. c. 79. all mortgages and other securities, upon estates or other property in *Ireland*, or the plantations, bearing interest, not exceeding 6*l.* *per cent.*, shall be legal, though executed in the kingdom of *Great Britain*; unless the money lent shall be known at the time to exceed the value of the thing or pledge; in which case also, to

prevent usurious contracts at home, under the colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed.

Of the Statutes 13 Eliz. c. 5. and 27 Eliz. c. 4.

§ 16. By the statute 13 *Eliz.* c. 5. for avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, &c. devised or contrived, to the end, purpose, and intent, to delay, hinder, or defraud creditors of their just and lawful actions, it is declared and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, &c. to or for any intent or purpose before declared, shall be deemed and taken (only as against that person or persons, his or their heirs, executors, administrators, and assigns, whose actions, suits, debts, &c. by such fraudulent devices, shall be in any wise disturbed, hindered, delayed, or defrauded) to be utterly void.

§ 17. By the statute 27 *Eliz.* c. 4. for the avoiding of fraudulent, feigned, and covinous conveyances, it is enacted, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation, of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and of purpose to defraud and deceive such person or persons as shall purchase in fee simple, fee tail, for life or years, the same lands, shall be deemed and taken, only as against all persons who shall purchase for money or other good consideration the same lands, &c. to be utterly void and of none effect.

§ 18. The

§ 18. The deeds and conveyances which are rendered void, or affected by these statutes, are of three kinds—1st, Deeds or conveyances, made with an express intention to defraud creditors or subsequent purchasers. 2d, Deeds or conveyances, made without any consideration, usually called voluntary conveyances. 3d, Deeds or conveyances made for good, but not for valuable considerations, such as deeds made to provide for a man's wife, children, or relations.

What Conveyances are within these Statutes.

§ 19. With respect to deeds made with an intent to defraud creditors, or subsequent purchasers, no doubts can arise respecting their nullity, whenever such an intent can be proved, even though they should be made for a good, or valuable consideration. And in *Twine's* case, the badges of fraud were, 1st, The conveyance was of all the grantor's property, without exception of his apparel, or any thing of necessity. 2d, The donor continued in possession. 3d, The conveyance was made in secret. 4th, There was a trust between the parties. Though in conveyances of land, it is said, in a subsequent case, that where the consideration is future, the donor's continuation in possession is not fraudulent; unless it be expressly proved that fraud was intended.

Deeds made with Intent to defraud Creditors and Purchasers.

3 Rep. 80.

Stone v. Grubham,
1 Roll. R. 3.

§ 20. Lord *Coke* says, if a person intending to sell his land, had by fraud conveyed it to the Queen, to the intent to deceive the purchaser, and afterwards sold the land to another, for a valuable consideration, and made a conveyance accordingly; the purchaser should

11 Rep. 74 a.

enjoy the land against the Queen; for although the Queen was not excepted, yet the act being general, and made to suppress fraud, shall bind the crown.

Tarback v.
Marbury,
2 Vern. 510.

§ 21. *A.* conveyed his estate to the use of himself for life, with power to mortgage such part as he should think fit, remainder to trustees to sell and pay all his debts, but continued in possession, and kept the deed. Afterwards *A.* became indebted by judgment bond and simple contract. It was decreed, that the deed of trust was fraudulent, as against the creditors by bond and judgment, who not having notice of the settlement, should not come in, on an average only, with the other creditors.

§ 22. With respect to the circumstances from which an intent to defraud a subsequent purchaser may be collected, the conveyance to such purchaser has been held sufficient to shew, that there was a fraudulent intent at the time when the first conveyance was made; and will therefore invalidate such first conveyance, as to the subsequent purchaser.

Burgell's
Case,
6 Rep. 72.

§ 23. It was resolved by Lord *Coke* and the other Judges of the Court of Common Pleas, in 5 *Jac.* that, if a father made a lease by fraud and covin, to defraud others, to whom he should sell it, and died; and the son, knowing or not knowing of the lease, sells the land for good consideration, the vendee should avoid the lease by the stat. 27 *Eliz.* for it is not necessary that the person, who sells the land, should make the former conveyance.

§ 24. Although

§ 24. Although the subsequent purchaser should have notice of the preceding conveyance, yet he will be allowed to invalidate it: for notice cannot make that good, which an act of parliament renders void: and the completion of the purchase is necessary, to enable the purchaser to avoid the first conveyance under the statute: but this doctrine has been lately questioned,

Notice is im-
material.
Standen's
Case,
5 Rep. 60 b.

Cowp. R. 711.

Treat. of Eq.
B. 1. c. 4.
f. 13.

§ 25. When the Judges were first called upon to expound these statutes, they appear to have considered all voluntary conveyances, that is, all conveyances made without some consideration, as fraudulent, and consequently void against creditors. But it has since been established, that a voluntary conveyance, made by a person not indebted at the time, is not fraudulent; unless it should appear to have been made with a view to defraud subsequent creditors.

Voluntary
Conveyances.

§ 26. Thus, it is said in a note in *Dyer*, that if a man conveys land for preferment of his children, this shall be good, if he was not in debt at the time; but if he was in debt, it would be otherwise.

294 b.

§ 27. Lord *Hardwicke* says,—“ ’Tis necessary on
“ 13 *Eliz.* to prove, at the making of the settlement,
“ the person conveying was indebted at the time, or
“ immediately after the execution of the deed; or
“ otherwise it would be attended with bad conse-
“ quences, because the statute extends to goods and
“ chattels; and such a construction would defeat
B b 4 “ every

Walker v.
Burrows,
1 Atk. 93.

Infra.

“ every provision for children and families, though
“ the father was not indebted at the time.”

Ruffel v.
Hammond,
1 Atk. 15.

§ 28. But, where a person, who is indebted, makes a voluntary settlement, it is clearly void as to his creditors, by the statute 13 *Eliz.* And Lord *Hardwicke* has said,—“ I have hardly known one case, where the
“ person conveying was indebted at the time of the
“ conveyance, that has not been deemed fraudulent.
“ There are, to be sure, cases of voluntary settle-
“ ments that are not fraudulent: and those are,
“ where the person making is not indebted at the
“ time, in which case subsequent debts will not shake
“ such settlements.”

§ 29. In the case of a subsequent purchaser, a voluntary conveyance is considered as fraudulent and void, under the 27 *Eliz.* And the subsequent conveyance, being for a good or a valuable consideration, will in all cases prevail against it.

Standen v.
Bullock,
Toth. 257.

§ 30. The plaintiff bought several manors of *T. B.* deceased, who before the plaintiff's purchase, had conveyed the same by fine and recovery, to the defendant and his heirs male; which being done without consideration, was adjudged and decreed to the plaintiff.

Curson v.
Blackall,
Toth. 258,

§ 31. A father made a voluntary conveyance of land in tail, reserving an estate for life, and afterwards sold the woods upon the lands to a stranger.

It

It was decreed that the purchaser of the woods should have them, notwithstanding the conveyance.

Leach v.
Dean,
1 Cha. Rep,
78.

§ 32. Lord *Hardwicke* says,—“ There is certainly
“ a difference between the statute 13 *Eliz.* which is in
“ favour of creditors, and 27 *Eliz.* which is in
“ favour of purchasers. But that difference was
“ never suffered, by way of general rule, to go far-
“ ther than this. On the 27 *Eliz.* every conveyance
“ made, where there is a subsequent conveyance for
“ a valuable consideration, though no fraud in that
“ voluntary conveyance, nor the person making it at
“ all indebted, yet the determinations are, that such
“ mere voluntary conveyance is void at law, by the
“ subsequent purchase for a valuable consideration.
“ But the difference between that and the 13 *Eliz.* is
“ this: if there is a voluntary conveyance of real
• “ estate, or chattel interest, by one not indebted at
“ the time, though he afterwards becomes indebted,
“ if that voluntary conveyance was for a child, and
“ no particular evidence or badge of fraud to deceive
“ or defraud subsequent creditors, that will be good;
“ but if any mark of fraud, collusion, or intent to
“ deceive subsequent creditors appears, that will make
“ it void; otherwise not, but it will stand, though he
“ afterwards becomes indebted. But I know no case
“ on the 13 *Eliz.* where a man, indebted at the time,
“ makes a voluntary conveyance to a child without
• “ consideration, and dies indebted, but that it shall
“ be considered as part of his estate for benefit of his
“ creditors.”

2 Vef. R. 10.

Conveyances
for a good
Consideration
only.

§ 33. With respect to conveyances made for good considerations, that is, in favour of a wife, children, or near relations, they are also within these statutes, and are considered as fraudulent, against creditors, and subsequent purchasers: for, otherwise it would be in the power of any person to defraud his just creditors, by conveying his estate to his children or other near relations. Besides, there is always a strong presumption, that conveyances of this kind are attended with a secret trust in favour of the grantors.

Apharry v.
Boddingham,
Cro.Eliz.350.

§ 34. A conveyance by a person, of lands, which descended to him from his father, to the use of himself for life, remainder to his first son in tail, &c. was deemed fraudulent as against a bond creditor of the father; the jury having found that the son had notice of the debt, before he made the conveyance.

§ 35. Settlements on a wife or children, made after marriage, which are unsupported by any consideration, or by any agreement made before marriage, are voluntary, and void under the statutes; being only founded on the moral duty which every husband is under of providing for his wife and children.

Woodie's
Case, cited
Cro. Ja. 158.

§ 36. Thus, where a person after marriage assigned over a lease for years, as a jointure for his wife, and afterwards sold it. The purchaser was allowed to avoid the assignment as fraudulent,

Goodright v.
Moses,
2 Blackst.
Rep. 1019.

§ 37. *Joshua Rcade* being tenant for life, with remainder to his daughter *Elizabeth* in tail, they joined
in

in levying a fine to trustees, in trust for the father for life ; and, after his decease, for the maintenance of *Elizabeth* and her children, during the life of *Elizabeth* ; and, after the death of *Elizabeth* and her husband, to raise portions for the younger children, remainder to the right heirs of *Elizabeth*.

Elizabeth, having survived her husband, made a lease of the premises for twenty-one years, at a rack rent.

Upon an attempt to annul this lease, by the heir of *Elizabeth*, it was determined ; that the settlement was only a voluntary conveyance, within the statute 27 *Eliz.* being founded only on a good, and not a valuable consideration ; and therefore could not be set up against this lease.

§ 38. *Richard Emery* conveyed the premises in question, without any consideration, to the use of himself for life ; remainder to his wife for life ; remainder to the issue of *R. Emery* and his wife, in tail. Three years after, *R. Emery* and his wife mortgaged the premises to one *Staverton* for securing 700 *l.* And it appeared that *Staverton* was told at the time, that the estate was settled on *Emery's* wife and children.

Chapman v.
Emery,
Cowp. R.
279.

The question was, whether the mortgagee could avoid this settlement, as fraudulent, under the 27 *Eliz.* It was contended, that the statute related only to purchasers, and that a mortgagee was not a purchaser ; that no circumstance of fraud appeared,

as the settlement was three years prior to the mortgage,

Evelyn v.
Templar,
2 Bro. R. 148.

Lord *Mansfield* said, that a mortgagee was a purchaser; and that, in this case, the settlement was void as to the mortgagee,

Conveyances
with Power
of Revoca-
tion.

§ 39. By the 5th section of the statute 27 *Eliz.* it is enacted, that if any person shall make any conveyance, with a power of revocation, and afterwards shall convey or charge the same lands for money, or other good consideration, without revoking the first conveyance, then the said first conveyance shall, as against such second conveyance, or charge, be deemed void and of no effect.

Standen v.
Bullock,
3 Rep. 82 b.

1 Sid. 133.

§ 40. Where a man had conveyed lands to the use of himself for life, remainder to several others of his blood, with a future power of revocation; and, before the power of revocation began, he, for a valuable consideration, bargained and sold the land to another and his heirs: it was adjudged, that this bargain and sale was within the remedy of the statute; as the intent of the statute was, that such voluntary conveyance, which was originally subject to a power of revocation, be it *in presenti* or *in futuro*, should not stand against a purchaser, *bonâ fide*, for a valuable consideration.

§ 41. Where a power of revocation is inserted in a conveyance, which can only be exercised with the consent of persons who are not under the controul of the

the settlor; such conveyance will not be considered as within this act.

§ 42. Sir *John Maynard* and his wife, in consideration of the marriage of their son, and of 5000 *l.* portion paid with his intended wife, covenanted with four persons to levy a fine of lands, which were the estate of Lady *Maynard*, to the use of Sir *John* for life; remainder to the son and his heirs, with a proviso that it should be lawful for Sir *John* or his wife to revoke the uses, with the consent of four persons, who were parties to the covenant, or the survivors or survivor of them. After Sir *John's* death, his wife entered, and sold the estate, without any consent, to a person who had notice of the former conveyance.

Bullet v. Waterhouse,
2 Jones 94.
2 Show. 46.

It was resolved, that this conveyance was not fraudulent within the statute 27 *Eliz.* as it could not be made to deceive a purchaser, the power of revocation not being exercisable at the will and pleasure (such are the words of the act) of the settlor, but was restrained by the necessity of obtaining the consent of four persons, entrusted for the son's wife: whereas, in the case stated in 3 *Rep.* 83 *b.* the consent seemed to be given by a person, at the devotion of the settlor, and appointed by him.

§ 43. In all modern settlements, powers of revocation, sale, and exchange, are reserved to the trustees; left, if reserved to the settlor, such settlements should

Booth's Op. Coll. Jur. V.
1. 426.

be deemed fraudulent against purchasers, within ~~this~~ proviso in the act.

Who are
deemed Pur-
chasers under
the 27 Eliz.
3 Rep. 83 a.
8 Atk. 601.

§ 44. With respect to the persons, who are deemed purchasers under the statute 27 *Eliz.*, it was resolved in *Twine's* case, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who was a purchaser for money, or other valuable consideration; for, although in the preamble it is said, for money or other good considerations, and likewise in the body of the act, yet these words are to be intended only of valuable consideration. And this appeared by the clause respecting powers of revocation: for there it is said, for money or other good consideration paid or given; where the word *paid* is referred to money, and *given* to good consideration, which excludes all considerations of nature or blood, or the like; and were to be intended only of valuable considerations, which might be given; and therefore he only, who made a purchase of land for a valuable consideration, was a purchaser under this statute.

3 Rep. 83 b.

§ 45. In *Twine's* case, *Anderson* said, that a man, who was of small understanding, and not able to govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance; and that he should not have power to waste and consume the same. And afterwards he, being seduced by deceitful and covinous persons, for a small
sum

sum of money bargained and sold his lands, which were of great value. This bargain, although it was for money, was holden to be out of the statute; which was made against all fraud and deceit, and doth not help any purchaser who doth not come to the land for a good consideration, lawfully and without deceit.

§ 46. Where a person made a lease, without receiving any fine, or reserving any rent, it was resolved, that the lessee was not a purchaser within the statute 27 *Eliz.*, and therefore could not avoid a preceding conveyance.

Upton v. Bassett,
Cro. Eliz. 449.

§ 47. It has been held, that marriage is a sufficient consideration to establish a second conveyance; and to render a prior one fraudulent and void, as against such second conveyance. But a conveyance to a man's children, or to his wife after marriage, by way of jointure, will not enable them to avoid a preceding conveyance.

Douglas v. Waad,
1 Cha. Ca. 99.

§ 48. In the case of *Upton v. Bassett, Beaumont*, Justice, said, where one made a lease for eighty years, without consideration, and afterwards conveyed the land to his wife for her jointure, after marriage: It was resolved, that this last conveyance was voluntary, and without valuable consideration; and that the wife could not avoid the former lease, by averring that it was fraudulent.

Ante f. 46.

§ 49. A mort-

Chapman v.
Emery,
Goodright v.
Moses, ante.

§ 49. A mortgagee is a purchaser within the statute 27 Eliz., as also a lessee at a rack rent ; and therefore may avoid a preceding conveyance, as fraudulent against them,

§ 50. Where the price is inadequate in a considerable degree ; or, where an apparent inadequacy of price is coupled with other circumstances, indicating a fraudulent collusion between the purchaser and the vendor, to avoid a preceding conveyance, a purchaser under such circumstances will not be entitled to the protection of this statute.

Doe v.
Routledge,
Cowp. R.
305.

§ 51. *William Watson*, being seised in fee of certain copyholds, surrendered them in 1763, to the use of himself for life, remainder to his nephew *Routledge* in fee. *Routledge* married soon after ; and, previously thereto, shewed a copy of this surrender to his wife and her father.

Ten years after the first surrender, *William Watson* surrendered the same premises to the use of *Hugh Watson*, who was also his nephew, in fee : and by a deed of the same date, executed by *William Watson*, reciting, that *Hugh Watson*, upon the proposal and at the request of *William Watson*, had come to an agreement with *William Watson* for the absolute purchase of the said premises, for the sum of 200 l. ; and reciting the said surrender in pursuance thereof, *William Watson* acknowledged the receipt of the 200 l. from *Hugh Watson*, in full for the purchase of the premises, and covenanted with *Hugh Watson*, that he *William Watson* was

was owner of the premises, and had good right to surrender the same to *Hugh Watson* and his heirs.

The 200*l.* was proved to have been paid at the execution of the deed, and *Hugh Watson* was admitted. It was also proved, that *Hugh Watson*, before the surrender to him, knew of the former surrender; and that the premises, at the time of the surrender to *Hugh Watson*, were worth from 1800*l.* to 2000*l.*

It was contended that the first surrender, being merely voluntary, was void under the statute 27 *Eliz.* c. 4. in respect to the second surrender; which was made to a *bond fide* purchaser, and for a valuable consideration.

Lord *Mansfield* observed, that the statute does not say, that a voluntary settlement shall be void, but that a fraudulent settlement shall be void. There is no part of the act of parliament, which affects voluntary settlements *eo nomine*, unless they are fraudulent. To be sure, it is very difficult against fair honest creditors, to support a voluntary settlement. His Lordship then cited the case of *Newstead v. Searles*.

Intra.

On the other side it was contended, that the first surrender, though made in consideration of love and affection only, was not fraudulent.

Lord *Mansfield*:—One of the questions in this case is, whether the settlement of 1763 is, under all the circumstances of this case, covinous and fraudulent, within the true intent and meaning of the statute

27 *Eliz.* Now, in that statute, there is not a word that impeaches voluntary settlements, but as fraudulent and covinous. The title of the statute is against covinous and fraudulent conveyances; where nominally one man passes, and where nominally his estate is conveyed to another; but where in fact it is agreed, that the grantor shall keep it to his own use, and so to answer the purposes of fraud. The enacting part considers it in the same light, and makes an express provision against such practices, as if they were criminal: for it says (sect. 3.) “ That all parties to such
 “ fraudulent grants, &c. who shall attempt to defend
 “ the same, shall forfeit one year’s value of the land
 “ so purchased; and also, being lawfully convicted,
 “ shall suffer six months imprisonment.”

But no person, making a voluntary settlement, by way of provision for his family, was ever considered in that criminal light. Where a fraudulent use is made of a settlement, that indeed may be carried back to the time when the fraud commenced. A custom has prevailed, and been leant to extremely, to construe voluntary settlements fraudulent against creditors; but, if the circumstances of the transaction shew it was not fraudulent at the time, it is not within the meaning of the statute, though no money was paid; for instance, what is generally done in marriage settlements; if the father upon the marriage of his eldest son, in a settlement upon him, limits remainders to half a dozen younger brothers, after the consideration of the marriage, those remainders are good within the meaning of the statute against any claim of
 creditors;

creditors; and the reason is, because it was a good settlement at the time.

With respect to the deed to *Hugh Watson*, the question is, whether it be such a deed as is entitled to protection, and ought to set the other aside. In order to do that, it should be a *bonâ fide* transaction, and a fair purchase in the understanding of mankind; or, for a good consideration, as a settlement in consideration of marriage: and there such a settlement would set aside and take place of a former fraudulent deed. It is not necessary that it should be for money, but it must be a fair *bonâ fide* transaction: if it is colourable only, it cannot stand. Now, what are the circumstances of the second settlement in the present case? Manifestly a mere contrivance! *Hugh Watson* has notice of the former settlement: *William*, the uncle, had changed his mind. What was to be done to set the prior deed aside? A new one was to be made under such circumstances, and for such a consideration as they thought would effectuate the purpose. They agree therefore, that all affection was to be left out, no generosity to appear or be mentioned: but *Hugh Watson* was at the request of *William*, to agree to give a price which, it is to be supposed, fully satisfied the seller. It is a fraud, and no purchase at all. The consideration of 200*l.* which is to support it as a deed for a valuable consideration, compared with the real value 2000*l.*, shews it to have been no purchase at all, but a gift.—Judgment was given for *Routledge*.

Proviso in
Favour of
Conveyances
made upon
good Con-
sideration.

§ 52. There is a proviso in the statute 13 *Eliz.* f. 6. that it shall not extend to any estate or interest in lands made upon good consideration, and *bonâ fide*, to any person or persons, or bodies politic, not having at the time of such conveyance any notice of such covin, fraud, or collusion. And in the statute 27 *Eliz.* f. 4., there is a proviso, that it shall not be construed to impeach any conveyance of lands, made upon good consideration, and *bonâ fide*.

Settlements
in Considera-
tion of Mar-
riage.
Plowd. 58.

§ 53. The consideration of an intended marriage has always been held to be a valuable one, and, consequently, sufficient within this proviso, to render a conveyance valid against creditors and purchasers.

Kirk v.
Clark,
Prec. in Cha.
275.

§ 54. A person having a reversion in fee in a copyhold estate, surrendered it to his eldest son in tail, remainder to his own right heirs, in order that his son, coming in as a purchaser, should pay a smaller fine: afterwards the father, on a treaty of marriage between his son and *B.*, told *B.*'s friends that this copyhold was so settled; and the marriage was had, and a portion of 2000 *l.* was paid. Afterwards the father settled the copyhold on a second wife. Lord Chief Justice *Cowper* decreed, that the surrender to the son was good; for, though it was at first voluntary, yet, upon the treaty of marriage, it was a principal inducement, and therefore became valuable, and ought to be considered as if it had been then surrendered to the son.

Griffin v.
Stanhope,
Cro. Ja. 454.
1 Ab. Eq.
354.
1 Vent. 194.

§ 55. Though a settlement be executed after marriage, yet, if it is made in consequence of an agree-
ment

ment entered into before the marriage, or in consideration of an additional portion, it will be as good as if made before marriage,

§ 56. The defendant's father, some time after marriage, in consideration of an additional portion of 100 l. paid by his wife's mother, settled an estate of 100 l. *per annum* upon himself for life, remainder to his first and other sons, &c.: and the mother of the defendant's father, having an interest in this estate, joined with him in the conveyance.

Jones v.
Marth,
Forrest. 63.

Thirteen years after, the father mortgaged this estate to the plaintiff with the usual covenants, and died.

The question was, whether the settlement should be looked upon as voluntary, and fraudulent against the mortgagee.

Lord Talbot.—The question is, whether this be a voluntary conveyance or not? Here is a plain proof that 100 l. was paid, the receipt being indorsed on the back of the deed; and, in marriage settlements, things are not to be considered so strictly, there being room for bounty, and every man ought to provide for his wife and family: besides, in this case, that moved from the defendant's father's mother, and she may, in some respect, be considered as a purchaser of the limitations made to her grandchildren; so that it would be very hard to call this a fraudulent settlement, since it is in consideration of a marriage had, and of an additional portion of 100 l. paid by the wife's relations,



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which cannot be called voluntary against a mortgage made 13 years after.

Brown v.
Jones, 1 Atk.
188.

§ 57. *Roger Williams* made a settlement in consideration of a marriage already had, and a portion of 1000 l. paid to him by his wife's brother, by which he limited his estate to himself for life, remainder to his wife for a jointure, remainder to trustees for 99 years, remainder to his first and other sons in tail male.

The husband became a bankrupt, and the question was, whether this settlement was good against his creditors.

Lord *Hardwicke* said, it was admitted, if a settlement was made before marriage, though without a portion, it was good; for marriage itself was a consideration. And it was equally good, if made after marriage; provided it was upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money was afterwards paid pursuant to the agreement. This was allowed, both in law and equity, to be sufficient to make it a good and valuable settlement.

His Lordship decreed it to be a good settlement against the creditors, except as to the husband's life estate, and that the term of 99 years should attend the inheritance.

Stileman v.
Ashdown,
2 Atk. 477.

§ 58. In a subsequent case, Lord *Hardwicke* said, that a settlement, though made after marriage, yet being

ing in consideration of a portion, which (for any thing that appeared) was paid at the time, could not be impeached by subsequent creditors.

§ 59. In another case, where a settlement was made after marriage in consideration of a portion paid, and of the covenants and agreements after mentioned, Lord *Hardwicke* said,—“ As to the first objection, this settlement was made after marriage; but there are many settlements and articles after marriage, which have been on good consideration decreed to be performed in this court, and after a length of time. But it is farther said to be voluntary: for, though it is rightly admitted that, if a portion is paid, it will make it equal to a settlement before marriage, yet it is said this cannot be so; but the words of the settlement do not import that, on which this objection is founded: for it is also in *consideration of the covenants, grants, and agreements, after mentioned*; and, if they had agreed before marriage in that manner, that would have connected the one with the other, and made a good consideration: so that it appears a settlement made for consideration agreed on between the parties at that time.

Ramsden v. Hylton,
2 Vef. 304.

“ As to the next objection, it is not in every case, that, supposing the portion is not paid, the issue of the marriage shall not have the benefit of the uses of the settlement or articles, because the issue of the marriage take from both parties; and whether they perform the agreement among themselves, may be immaterial to the issue; and several decrees have

“ passed on that foundation ; they being purchasers
 “ under both, and, consequently, both are obliged to
 “ perform. But there is no occasion to enter into
 “ that, for I am satisfied the portion was paid ; and I
 “ wonder they have made so much proof of it at this
 “ distance of time ; and then it appears to be for va-
 “ luable consideration.”

§ 60, Where a wife joins with her husband in destroying the settlement made on her marriage, and a new settlement is made, such new settlement will be good, though a better provision is made for the wife and children, than was contained in the original settlement.

Scott v. Bell,
 2 Lev. 70.

§ 61. Sir *R. Bell*, upon his marriage, settled certain estates on himself for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail, remainder to his own right heirs. Sir *R. Bell* having afterwards contracted debts, and there being no issue of the marriage, his wife joined him in a fine of the settled estates ; and they were sold. Sir *R. Bell* covenanted to stand seised of other estates to the same uses as those contained in the settlement.

It was resolved by Lord *Hale*, and the other judges, that the second settlement was good and valid against subsequent creditors ; for, the old settlement being destroyed, and the new one made the same day, an agreement by the husband to make the new settlement, in consideration of the wife's having joined in the fine

to destroy the old settlement, would be presumed; and this consideration should extend to all the limitations in the new settlement, although the estates comprised in the new settlement were nearly double the value of those contained in the old one.

Vide Brill
v. Burnford,
Prec. in Cha,
113.

§ 62. It was determined, in the following modern case, that a settlement made before marriage, in consideration of the marriage, and of a marriage portion, by a person who was indebted at the time, was good against creditors.

§ 63, Lord *Montfort*, by settlement before his marriage, in consideration of such marriage, conveyed all his household goods, together with his lands, to trustees in strict settlement. It was proved, that at the time of the settlement, it was known that Lord *Montfort* was in debt; but he thought the fortune of the lady he was to marry, which amounted to 10,000 *l.* was amply sufficient to pay all the debts he owed at that time, and had no idea of disappointing any creditor. *Kennett*, who was a judgment creditor of Lord *Montfort* at the time of his marriage, took those goods in execution; and the trustees in the settlement brought an action of trover against him for them. The cause was tried; and a case was reserved for the opinion of the Court of King's Bench,

Cadogan v.
Kennett,
Cowp. 433.

Lord *Mansfield*.—"The question, in this case, is, whether the plaintiffs, who are trustees under the marriage settlement of Lord *Montfort*, by which the household goods in question are settled as heir-looms, with

“ with the house, in strict settlement, and specifically
 “ enumerated in a schedule annexed to the settlement,
 “ so as to avoid any fraud by the addition or purchase
 “ of new, are entitled to the possession of these goods
 “ against the defendant Mr. *Kennett*.

“ The defendant has taken the goods in execution,
 “ and it is not disputed that he is a fair creditor; but
 “ the plaintiffs bring this action as trustees under the
 “ marriage settlement. And the question is, whether
 “ they are, against the defendant, entitled to the pos-
 “ session of these goods, for the purposes of the trust.

“ I have thought much of this case since the trial,
 “ and, in every light in which I have considered it,
 “ I have not been able to raise a doubt.

“ The principles and rules of the common law, as
 “ now universally known and understood, are so strong
 “ against fraud in every shape, that the common law
 “ would have attained every end proposed by the sta-
 “ tutes 13 *Eliz.* c. 5., and 27 *Eliz.* c. 4. The former
 “ of these statutes relates to creditors only; the latter
 “ to purchasers. These statutes cannot receive too
 “ liberal a construction, or be too much extended in
 “ suppression of fraud.

“ The statute 13 *Eliz.* c. 5., which relates to cre-
 “ ditors, directs, “ that no act whatsoever, done to
 “ defraud a creditor or creditors, shall be of any effect
 “ against such creditor or creditors:” but, then, such
 “ a construction is not to be made in support of cre-
 “ ditors,

“ ditors, as will make third persons sufferers. There-
 “ fore the statute doth not militate against any trans-
 “ action *bonâ fide*, and where there is no imagination
 “ of fraud ; and so is the common law. But, if the
 “ transaction be not *bonâ fide*, the circumstance of its
 “ being done for a valuable consideration, will not
 “ alone take it out of the statute. I have known se-
 “ veral cases, where persons have given a fair and full
 “ price for goods ; and, when the possession was
 “ actually changed, yet being done for the purpose of
 “ defeating creditors, the transaction has been held
 “ fraudulent, and, therefore, void. One case was,
 “ where there had been a decree in the Court of
 “ Chancery, and a sequestration : a person, with know-
 “ ledge of the decree, bought the house and goods
 “ of the defendant, and gave a full price for them.
 “ The court said, that the purchase, being with a ma-
 “ nifest view to defeat the creditor, was fraudulent ;
 “ and, therefore, notwithstanding a valuable consider-
 “ ation, void. So, if a man knows of a judgment
 “ and execution, and, with a view to defeat it, pur-
 “ chases the debtor’s goods, it is void ; because the
 “ purpose is iniquitous : it is assisting one man to cheat
 “ another, which the law will never allow. There
 “ are many things which are considered as circum-
 “ stances of fraud. The statute says not a word about
 “ possession : but the law says, if, after a sale of goods,
 “ the vendor continue in possession, and appear as the
 “ visible owner, it is evidence of fraud, because goods
 “ pass by delivery : but it is not so in the case of a
 “ lease, because that does not pass by delivery.

“ The

Infra f. .

“ The statute 13 *Eliz.* c. 4. does not go to volun-
 “ tary conveyances, merely as being voluntary, but
 “ to such as are fraudulent. A fair voluntary con-
 “ veyance may be good against creditors, notwith-
 “ standing its being voluntary. The circumstance of
 “ a man’s being indebted, at the time of his making
 “ a voluntary conveyance, is an argument of fraud.
 “ The question, therefore, in every case is, whether
 “ the act done is a *bonâ fide* transaction; or, whether
 “ it is a trick and contrivance to defeat creditors. If
 “ there be a conveyance to a trustee for the benefit
 “ of the debtor, it is fraudulent: the question then
 “ is, whether this settlement is of that sort? It is a
 “ settlement, which is very common in great families.
 “ In wills of great estates, nothing is so frequent as
 “ devises of part of the personal estate to go as heir-
 “ looms: for instance, the devise of the Duke of
 “ *Bridgewater’s* library—the old Duke of *Newcastle’s*
 “ plate. So, in marriage-settlements, it is very com-
 “ mon for libraries and plate to be thus settled, and
 “ for chattels and leases to go along with the land.
 “ If the husband grows extravagant, there never was
 “ an idea that these could be afterwards overturned.
 “ If this court were to determine that they should,
 “ the parties would resort to Chancery. We come
 “ then to the circumstances of the present case, which
 “ are very strong. There is not a suggestion of any
 “ intention to defraud, or the most distant view of
 “ disappointing any creditor. The very object of the
 “ marriage-settlement was, that the lady’s fortune
 “ might be applied to discharge all Lord *Montfort’s*
 “ debts. The amount of this fortune was 10,000 l.,
 “ and

“ and was thought fully sufficient for that purpose.
 “ Besides, this is a settlement approved by a Master
 “ in Chancery :—most clearly the Master in Chancery
 “ and the Great Seal could have no fraudulent view.
 “ But it appears further, that the reason why the
 “ goods were inserted was, because the settlement of
 “ the real estate alone was deemed inadequate without
 “ them. Clearly, therefore, it was no contrivance to
 “ defeat creditors, but meant as a provision for the
 “ lady, if she survived, and heir-looms for the son.

“ An argument, however, is drawn from the pos-
 “ session as a strong circumstance of fraud ; but it
 “ does not hold in this case. It is a part of the trust,
 “ that the goods shall continue in the house, and for
 “ a very obvious reason ; because the furniture of one
 “ house will not suit another : and it was the busi-
 “ ness of the trustees, to see the goods were not re-
 “ moved. If Lord *Montfort* had let his house with
 “ the furniture, or if the rent could be apportioned,
 “ the creditors would be entitled to the rent, but they
 “ have no right to take the goods themselves : the
 “ possession of them belongs to the trustees, and the
 “ absolute property of them is now vested in the
 “ eldest son.

“ I expected an authority ; but though such settle-
 “ ments are frequent, no case has been cited to shew
 “ they are fraudulent. How common are settlements
 “ of chattels and money in the stocks ? Can there
 “ be a doubt but they are good ? Yet the creditors
 “ would be entitled to the dividends during the in-
 “ terest

“ tereft of the debtor. Here there was clearly no
 “ intention to defraud, and there is a good confidera-
 “ tion. Therefore I am of opinion, it could not be
 “ left to the jury to find the fettlement fraudulent,
 “ merely becaufe there were creditors. The goods
 “ muft now be kept in the houfe for the benefit of
 “ the fon.”

Stephens v.
 Olive,
 2 Bro. R. 9.

§ 64. In a modern cafe, it was held by Lord *Kenyon*, (when Master of the Rolls) that a fettlement after a marriage, in favour of a wife and children, by a perfon not indebted at the time, was good againft fubfequent creditors, and not within the 13 *Eliz.* And in a fubfequent cafe it was determined by the Master of the Rolls, that to impeach a fettlement after marriage, under the ftatute 13 *Eliz.* the husband muft be proved to have been indebted at the time, and to the extent of infolvency.

Luth v.
 Wilkinfon,
 5 Vef. Jnn.
 384.

§ 65. Lord *Kenyon*, in the cafe of *Stephens v. Olive*, held, that, where a husband after marriage conveyed an eftate to trustees, for the feparate ufe of his wife, the covenants by the trustees to indemnify the husband againft the debts, which the wife might contract, after the feparation, was a valuable confideration; and therefore that the fettlement, although made after the debt due to the plaintiff was contracted, was good againft him.

How far the
 Confideration
 of Marriage
 extends.

§ 66. In the cafe of fettlements made before marriage, there has been a confiderable difference of opinion, refpecting the extent to which the confidera-
 tion

tion of marriage ought to be carried ; some holding that it ought to extend not only to the estates limited to the husband and wife, and their issue, but also to those limited to any other branch of the husband's family.

§ 67. Thus, where a person in consideration of the marriage of his son, and of 2000 *l.* marriage portion, settled the premises to the use of himself for life, remainder to his son and the heirs of his body by that marriage, remainder to the heirs of the body of his son by any other wife. It was contended that this last limitation, not being within the consideration of the marriage settlement, was voluntary, and therefore void against subsequent purchasers. But Lord *Hale* said, that “ the consideration of the marriage and “ marriage portion will run through all the estates “ raised by the settlement ; though the marriage be “ not concerned in them, so as to make them good “ against purchasers, and to avoid a voluntary conveyance.”

Jenkins v. Kemis,
Hard. 395.

§ 68. A person covenanted in consideration of the marriage of his eldest son, and a marriage portion, to settle lands on him in tail, remainder to his second son. It was held, that the consideration extended to the remainder to the second son, which therefore was not fraudulent against creditors. And Lord *Macclesfield* has observed, that the reason of this doctrine was, because it might be very well intended that the husband or his parents would not have come into the settlement,

White v. Stringer,
2 Lev. 105.

2. P. Wms.
175.

settlement, unless all the parties thereto had agreed to the limitation to the brother.

§ 69. On the other hand there are several cases, where the consideration of marriage has only been allowed to extend to the immediate objects of the settlement, and not to any remote ones. Thus it is said
 10 Mod. 534. by Lord *Macclesfield*, that where there is a marriage portion and settlement, that part of the settlement only, which belongs to the wife, and children by that wife, can be esteemed to be founded upon the consideration of that marriage: for it is absurd to imagine, that the friends of the wife should be supposed as at all concerned about the remote uses of the settlement, upon persons, to whom they are entire strangers. And, as for the case of *Jenkins v. Keymis*,
 Ante L. 67. it ought not to be understood in so absurd a sense as that comes to; the meaning of the case was no more than this, that a father, when he makes a marriage settlement upon one son, has such a fair and justifiable opportunity offered him of providing for his other children, as that if he thinks fit to lay hold upon and embrace it, by inserting in the settlement provisions for them, such provisions shall never be esteemed as fraudulent, and as such set aside in favour of creditors.

9 Mod. 132. § 70. In another case his Lordship said, that, where a settlement is made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders, limited to his children and their posterity, are within the consideration of the settlement;

settlement; but, when it is made by a brother, or other collateral ancestor, on his marriage, there, after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, and not within the considerations of the marriage settlement.

§ 71. Where any other consideration, besides that of marriage, appears in a settlement, the court will avail themselves of it to support such settlement.

§ 72. *John Hamerton* being seised in fee of an estate, and having a mother who had an annuity of fifty pounds *per annum* issuing out of the whole, and also two brothers, *Thomas* and *Vavasor*; and being about to be married; his mother, previous to the marriage, consented to part with her security upon the *whole* estate for her annuity, and to take instead thereof a security for the same upon *part* of the estate: and, accordingly, she and *John* (the intended husband) joined in a fine to deliver the whole estate from the annuity, and in consideration of the marriage, and of a portion of 1300 *l.*, and of the grant and release of the annuity, *John* conveys to trustees, that they should pay fifty pounds *per annum* to the mother, out of *part* of the estate for her life, then as to the whole, to the use of *John* for life; remainder to trustees to preserve contingent remainders; remainder to the first and every other son in tail male; remainder to *Thomas Hamerton* and *Vavasor Hamerton* severally, one after the other in tail male, in strict settlement; remainder to the daughter, and daughters of *John Hamerton*, by his intended wife in tail; remainder to *John Hamer-*

Roe v.
Mitton,
2 Will. R.
356.

ton in fee. There was no issue of the marriage; afterwards *John Hamerton* mortgaged the estate to *Monckton*, and acknowledged a fine to him *sur concessit*, then *Monckton* purchased of *John Hamerton* in fee, for a valuable consideration, and took a fine from him *sur conusance de droit come ceo, &c.*: *John Hamerton* died without issue; but *Thomas Hamerton* left a son, who brought an ejectment to recover the estate.

Lord Ch. Just. *Wilmot* said—The single question is, whether there is a good and valuable consideration to support the limitation in the settlement to *Thomas Hamerton*, the late father of the lessor of the plaintiff; or, whether that limitation is merely voluntary under the statute of 27 *Eliz.* cap. 6. and bad against a purchaser for a valuable consideration.

I am very clearly of opinion, that this settlement is fair and honourable, and that there is a good and valuable consideration to support the limitation therein to *Thomas Hamerton*, the father of the lessor of the plaintiff; and that it is quite out of the 'statute 27 *Eliz.* c. 6. which was only made against covinous and fraudulent conveyances, and which makes the parties avowing such fraudulent conveyances criminal; whether the purchaser for a valuable consideration had notice of this settlement or not, is not material (I think) in this case; but, if he had notice, I am clearly of opinion that the purchase is fraudulent.

The whole of this question turns upon the mother's joining in the settlement; the friends and relations of *Mary Kelly* (the intended wife of the marriage) must be

be supposed to say to the mother of *John* the intended husband, “*Mary* shall not marry your son, unless
 “ you will give up or take off your annuity from the
 “ *whole* of the lands, and let it be charged upon *part*
 “ thereof.” The mother answers, “ If you want my
 “ assistance, you shall pay for it; that is to say, you
 “ shall limit the estate to my younger sons, in pre-
 “ ference and priority to the daughters of the mar-
 “ riage, in failure of issue male:” this is a good
 consideration to *John* the son (and the *quantum* is not
 at all material); he purchases his wife by his mother’s
 concurrence.

But it was objected, that *John* was seised in fee, and
 could have made the settlement without the mother;
 and that in truth no real or good consideration moved
 from her at all, for that she still had her annuity
 charged upon *part* of the lands: in answer to this,
 the applying to the mother shews, that *John Hamerton*
 could not have made a settlement agreeable to the
 lady’s friends, without the mother; and I am of
 opinion that any consideration, given by the mother,
 would have made her a purchaser for her younger
 sons; by the limitation to the daughters of the mar-
 riage, after *that* to the two brothers of *John Hamerton*,
 it is plain the mother intended her sons should be
 preferred to the daughters of the marriage: and this
 is as plain to me as if I had heard the mother say,
 “ I will not part with my annuity secured upon the
 “ whole lands, and take a security for it upon part of
 “ the lands, unless you will prefer my sons to your
 “ daughters;” the settlement can have no other
 meaning; and any consideration moving from a parent

to a child is good. The whole court were of the same opinion; and judgment was given for the plaintiff.

Settlement by
a Widow on
her Children.

§ 73. There have been some cases, in which a conveyance, founded on a moral consideration only, has been held good against a subsequent purchaser.

Newstead v.
Searles,
1 Atk. 265.
King v
Cotton,
2 P. Wms.
674

§ 74. A widow who had two children, by articles previous to her second marriage, with the consent of her intended husband, settled her estate upon her two children. The husband and wife afterwards mortgaged the estate to a person who had notice of the settlement. Lord *Hardwicke* said, the question was, whether the articles were for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers. And if he was to lay it down as a rule that such articles were not binding, it would become impossible for a widow on her second marriage, to make any certain provision for the issue of a former; and the second husband might then contrive to defeat the provision made for those children. His Lordship therefore decreed, that the articles ought not to be considered as voluntary, for there were reciprocal considerations both on the part of the husband, and the wife, and the mortgagee had notice of the articles.

Whether
Copyholds
are within
these Sta-
tutes,

§ 75. It appears to be somewhat doubtful whether copyhold estates are within these statutes. In a modern case it was contended, that copyholds not
being

being within the mischief intended to be remedied by these acts, were not comprehended under the general words, lands, tenements, and hereditaments. Lord *Mansfield* observed, there was great reason to say, that the statute 17 *Eliz.* does extend to copyhold estates; but it was strange that such a point should be first agitated at that time. He should rather think it had been taken for granted, that the statute does extend to copyhold estates, because in being so construed, it can work no prejudice to the lord: and the object of the statute was, to suppress fraud, but it was not necessary absolutely to determine that question,

Doe v.
Routledge,
Cowp. 705.

§ 76. The statutes 13 and 27 *Eliz.* only avoid voluntary conveyances, as against creditors and subsequent purchasers; and therefore the person making a voluntary conveyance, and all those claiming under him, are as much bound by it, as if it was made for a valuable consideration.

Voluntary
Conveyances
are binding
on the Party.

Treat. of Eq.
B. 1. c. 4.
s. 12,

§ 77. *A.* made a voluntary conveyance to *B.*, and afterwards made a mortgage of the same lands. The first deed, on a trial at law, was found to be fraudulent. *B.* exhibited his bill to redeem the mortgage. It was decreed, that though the deed to *B.* was fraudulent, because *quoad* the mortgage money and *pro tanto*, it was voluntary, yet it was good as to the equity of redemption, and would pass it; for a voluntary deed is good against the party who makes it, and his heirs, though not against a mortgagee,

Rand v.
Cartwright,
Nell. Cha. R.
191.

Goodwin v.
Goodwin,
1 Cha. Rep.
173.

§ 78. Where there are two voluntary conveyances executed, the Court of Chancery will not relieve the latter against the former; and in such a case, he who has the estate by law shall hold it.

Durefs.

2 Inst. 482.

§ 79. All deeds made by persons under durefs of imprisonment, or durefs *per minas*, is void. Thus, if a person is put under any illegal restraint or confinement, until he executes a deed, he may alledge this durefs, and thereby avoid the deed. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, executes a deed, he will not be allowed to avoid it,

Id. 483.

§ 80. If a man, through a reasonable and well founded fear of death, or mayhem, or loss of limb, is prevailed upon to execute a deed, he may afterwards avoid it. But Lord *Coke* says, it is otherwise where a deed is executed for fear of battery, which may be very light, or burning his houses, or taking away, or destroying his goods, or the like, for there he may have satisfaction by recovery of damages.

Equity avoids
Deeds obtained
by Fraud.

§ 81. Although the courts of common law have a jurisdiction in all matters of fraud, and may set aside deeds upon that ground; yet the usual practice has long been to seek redress in equity, against deeds that have been fraudulently obtained, because a court of equity will allow of a great number of averments, and will admit of several kinds of evidence, which are not permitted in courts of law.

§ 82. The

§ 82. The cases which have been decided on this head are so various, and each of them depends so much on its own particular circumstances, that it would be impossible to deduce many general principles from them.

It may, however, be laid down, that ignorance and misapprehension of the party, is a ground on which courts of equity have sometimes avoided a deed. But equity will not interpose if the fact was from its nature doubtful, or equally unknown to both parties at the time of the agreement.

*Treat. of Eq.
B. i. c. 2. § 7.*

§ 83. It is not every surprise that will avoid a deed duly made, nor is it fitting, for it would occasion great uncertainty, and it would be impossible to fix what was meant by surprise, for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be: but the surprise here intended must be accompanied with fraud and circumvention, and then it must be proved; for fraud is a thing odious in law, and never to be presumed.

Idem f. 8.

§ 84. Inadequacy of consideration is a ground upon which equity has sometimes avoided a deed; provided it be such as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy. For these circumstances will shew a command over him, which may amount to a fraud. But there is no case in which it has been held, that mere inadequacy of

Idem f. 9. & 10.

*Gwynne v.
Heaton,
1 Bro. Rep. 1.*

price is a ground for a court of equity to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed. Still less does it seem to have been considered as a ground for rescinding an agreement actually executed.

Vide Bro.
Parl. Ca. Tit.
Fraud.

Treat. of Eq.
B. i. c. 4. s. 10.
Scribblehill
v. Brett,
4 Bro. Parl.
Ca. 144.

§ 85. Bonds or beneficial leases, taken as rewards for procuring marriages, will be set aside in equity; because such transactions tend to corrupt executors, trustees, guardians, and others connected with persons of fortune, to betray them into improper marriages.

3 Bro. Rep.
443.

§ 86. Weakness of understanding is also a ground upon which a court of equity will invalidate a deed; but Lord *Thurlow* has observed that there is an infinite, nay, almost insurmountable difficulty in laying down abstract propositions upon a subject which depends upon such a variety of circumstances, as the legal competency of the mind to the act in which it is engaged, if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility, sufficiently strong to lead to a suspicion of intellectual incapacity.

Or made in
Derogation
of the Rights
of Marriage.

§ 87. If a woman, on the point of marriage, charges or conveys away her estate to a stranger, such charge or conveyance will be decreed to be void, being in fraud of the right which the husband acquired to his wife's property by the marriage.

§ 88. Thus,

§ 88. Thus, a recognizance entered into by the wife the day before her marriage, was set aside, and a perpetual injunction granted, though one witness deposed the husband's consent to the drawing it, but that witness had an assignment of it to himself.

Lance v. Norman,
2 Rep. in Ch.
41.

§ 89. So, where a widow made a conveyance of her former husband's estate, prior to her marriage, and without the privity of her second husband; it was decreed, that the second husband should enjoy the estate notwithstanding.

Howard v. Hooker,
2 Rep. in Ch.
42.

§ 90. It has been determined on the same principle, that a conveyance made by a woman before her marriage to trustees, for her separate use, without the privity of her intended husband, will be void, as against the husband.

§ 91. Lady *Dayrell*, before her marriage, conveyed away her estate without the privity of her intended husband, to trustees for her separate use. It was decreed, that the husband should have the possession of the estate.

Carleton v. Dorset,
2 Vern. 17.

§ 92. Lord *Hardwicke* has said, that if a woman about to marry, gives away a part of her property, or gives a security or assignment, they are relievable against in Chancery. But where a debt is contracted for valuable consideration, though concealed from the husband, it is no fraud on the marriage.

Blanchet v. Foster, 2 Vef.
264.

§ 93. Where a widow assigned over the greater part of her property to trustees, in trust for herself during her

King v. Cotton,
2 P. W. 358.
674.

her widowhood, and, in the event of her marrying again, in trust for her second son, but the conveyance was made publicly, and prior to the marriage treaty with her second husband. On a bill filed by the husband to set aside this conveyance, Lord *King* dismissed it, saying, it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband ; and this being before her treaty of marriage with the plaintiff, it had been impossible to have asked him to be a party thereto, he not being then thought of.

§ 94. In a modern case, it appears to have been held, that a settlement made by a woman while unmarried, is not in all cases void against any husband she may afterwards take : to avoid such a settlement, the husband must shew to the court that he has been deceived ; mere concealment alone is not enough. And if he demands to have the deed set aside, without offering to make any provision for the wife, this is a ground for refusing relief. That in all cases, where a man comes into Chancery for his wife's fortune, he must make a settlement ; and a man who marries without a treaty, must be content to take a wife as he finds her.

Strathmore
v. Bowes,
2 Bro. R. 345.
1 Vef. Jun. 22.
6 Bro. Parl.
Ca. 427.

§ 95. The Countess of *Strathmore*, a widow, having five children, and being tenant for life of a very considerable real estate, on the 10th of *January* 1777, executed indentures of lease and release, dated the 9th and 10th of the same month, whereby she conveyed to two trustees, all the estates whereof she was seised for her life,

life, upon trust for her sole and separate use, exclusive of any husband she should thereafter marry, with a power of revocation.

This settlement was, in fact, made in contemplation of Lady S.'s marriage with Mr. *Grey*, and was with his knowledge and consent; but, on the 17th of the same *January*, she married Mr. *Stoney*, who afterwards took the name of *Bowes*. In the following month of *May*, Lady S., by the terror of personal violence, was compelled to sign a deed of revocation of the indentures of the 9th and 10th *January*. In the year 1785, Lady S. quitted her said husband, and ever after lived separate and apart from him, and exhibited her bill against him, in order to have the indentures of the 9th and 10th *January* established, and to set aside any deed of revocation she might have executed. An issue was directed to try whether the deed of the 1st *May* 1777 was obtained by duress, and the jury found that it was. The cause came on before Mr. Justice *Buller*, sitting for the Chancellor, who decreed, that the deeds of the 9th and 10th *January* should be established.

Upon a rehearing before Lord *Thurlow*, this decree was affirmed.

Mr. *Bowes* appealed to the House of Lords; and it was contended on his part, 1st, That the deeds of the 9th and 10th of *January* 1777, were a fraud upon the contract of marriage between the appellant and the respondent Lady *Strathmore*, being made without the knowledge

knowledge of the appellant, and concealed from him at the time of such marriage.

2d, That, although such deeds were suggested to have been made in contemplation of a marriage intended between the said Countess of *Strathmore* and another person, yet such marriage did not take effect; and, although the disposition made by those deeds might not be fraudulent, as against a person knowing of, and consenting to such disposition, yet, as it would be clearly fraudulent against creditors, or purchasers for a valuable consideration, there was no sound reason why the same should not be deemed fraudulent as against the appellant, who, by the marriage, gave to Lady *Strathmore* a legal title to dower in his own estate, (worth, at that time, as he asserted, about 1,000 *l. per annum*), and became responsible for all the obligations of a husband, and particularly for debts, contracted or to be contracted by her.

3d, That all the cases which have been determined by courts of equity upon the subject, agree in regarding such a disposition as fraudulent and void, especially, where made merely and only for the immediate and separate benefit of the person making it.

4th, That, if the decrees complained of should be established, a precedent would exist, destructive of confidence in every matrimonial engagement, and leading to consequences subversive of all the grounds on which the law of this country, with respect to the obligations

on husbands, by force of the contract of marriage, is founded.

The respondent submitted the following reasons for the affirmance of the decrees :

1st, That by the law of this country, a woman, while unmarried, may dispose of and convey her property in any manner she pleases ; and a husband whom she afterwards marries, without any settlement made by him, or any inquiry concerning her fortune, has no right to impeach any conveyance which she has made of her property, for her own separate use.

2d, That there is no instance, in which conveyances, made by a woman of her property before marriage, have been deemed void, because they have not been disclosed to the husband, unless attended with such circumstances as proved such conveyances to be fraudulent ; and that such conveyances are, in the case of a second marriage, where there are children by a former one, reasonable and laudable, and often favoured in a court of equity.

3d, That it was impossible to look at the circumstances of this case, without perceiving that such a conveyance, as the appellant attempted to impeach, might be extremely reasonable. That, if it be possible to conceive the husband, of all others, who ought the least to be permitted to question any such dispositions made by a wife, the appellant was that husband. That every step, by which he acquired his supposed marital rights,

rights, was grossly fraudulent ; and, therefore, it would be an extraordinary administration of equity, to give him the property of his wife, which the law has secured to her, as the reward of his fraud. That his attempt to invalidate the deed in question, must appear still more extraordinary, it having been determined that he, by terrors of personal violence, had extorted from the respondent another deed, for the purpose of defeating this, which, by the appeal, he contended, was in itself void.

Vide Treat.
of Eq. B. 1.
c. 2. f. 6.

The decree was affirmed, with 150 l. costs.

Martins v.
Bennett,
Bunb. 336.

§ 96. Where a father got his son to execute a deed secretly on the morning of his marriage, charging the estate which was settled, it was set aside by the Court of Chancery, as being in fraud of the marriage agreement.

Gilb. Cha.
267.

§ 97. Lord Chief Baron *Gilbert* says, if a husband seized in fee, should immediately before his marriage, vest the legal estate in trustees, to disappoint his intended wife of her dower, such a conveyance would be reckoned fraudulent ; because it was made with an ill conscience, in order to deprive his wife of the provision made for her by the common law.

TITLE XXXII.

D E E D.

CHAP. XXIII.

Of the Construction of Deeds.

- | | |
|--|---|
| <p>§ 1. <i>General Rules.</i>
 13. <i>Words sometimes rejected.</i>
 15. <i>Omissions supplied.</i>
 17. <i>Where a Deed cannot operate in the Way intended, it will be allowed to operate some other way.</i>
 23. <i>Where the Grantee has an Election, how to take.</i>
 26. <i>In what Cases Averments are admitted.</i>
 27. <i>Where a Deed is uncertain, it has no Effect.</i>
 29. <i>Construction of Conveyances to Uses.</i></p> | <p>§ 32. <i>Construction of Declarations of Trust.</i>
 34. <i>Construction of Articles.</i>
 35. <i>Particular Rules.</i>
 36. <i>Parties.</i>
 38. <i>Recital.</i>
 40. <i>Grant.</i>
 43. <i>Habendum.</i>
 50. <i>Where repugnant to the Premises.</i>
 55. <i>Where it enlarges, abridges, or explains the Premises.</i>
 64. <i>Where it is not controlled by the Premises.</i>
 67. <i>Words of Limitation and Purchase.</i></p> |
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Section I.

IN the construction of deeds, there are two sorts of rules ; one general, and applicable to every kind of deed : the other particular, and applicable only to some one kind of deed, or to some particular part of a deed.

General
Rules.
Shep. Tou.
253.

§ 2. With respect to the first sort, it is a maxim of the highest antiquity in the law, that all deeds should be construed favourably, and as near the apparent intention of the parties as possible, consistent with the rules of law. *Benignæ sunt faciendæ interpretationes chartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*

1 Inst. 36 a.
Plowd. 154.
160.

§ 3. If,

§ 3. If, however, the intention of the parties be contrary to the rules of law, it will then be otherwise; for it would be highly improper and inconvenient to permit private persons to contradict the general rules of law.

Thus, if a person conveys lands to another and his heirs for 21 years, the executor of the grantee, and not his heir, will be entitled to the land; because it is a rule of law, that a term for years is but a chattel.

2 Saund. 167. § 4. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* So that, where the intention is clear, too minute a stress ought not to be laid on the strict and precise signification of words; according to another ancient maxim, *qui hæret in litera, hæret in cortice.*

§ 5. *Mala grammatica non vitiat chartam;* so that, neither bad *Latin*, nor bad *English*, will make a deed void.

§ 6. The construction ought to be made on the entire deed, and not merely upon any particular part of it. *Ex antecedentibus et consequentibus fit optima interpretatio:* and, therefore, every part of a deed ought, if possible, to take effect, and every word to operate.

1 Inst. 183 a. § 7. A deed is always construed most strongly against the grantor. *Verba chartarum fortius accipiuntur contra proferentem; et quælibet concessio fortissime contra donatorem interpretanda est.* For the principle of self-

interest will make men sufficiently careful not to prejudice their own interest, by using words of too extensive a meaning; and all manner of deceit is hereby avoided in deeds; for men would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them.

§ 8. Where general words stand alone in a release, unqualified by any recitals, they shall be construed most strongly against the releasor; but where there is a particular recital in a deed, and those general words of release are inserted, the generality of the words shall be qualified by the recital.

§ 9. A release was executed in pursuance of an award, in which a release of all demands was inserted. It was contended, that the words were sufficient to release a growing rent; but it was determined, that they should not have so extensive an effect, because they were qualified by a particular recital.

Henn v. Handson,
1 Sid. 141.

§ 10. A distinction must, however, be made, in cases of this kind, between an indenture and a deed-poll. For the words of an indenture executed by both parties, are to be considered as the words of both. But, in a deed-poll, they are the words of the grantor, and shall be taken most strongly against him.

§ 11. If the words of a deed will bear two different senses, the one conformable to law and justice, and the other against it, that sense shall be preferred, which is conformable to law and justice: for it is also a maxim

1 Inst. 42 a

Idem 183 a.

of law, *quod legis constructio non facit injuriam*. Thus, if a tenant in tail makes a lease for life generally, it shall be for the life of the tenant in tail; for, otherwise, it would operate as a wrong.

§ 12. It is a rule of law, that no man shall raise a fee-simple to his own right heirs as purchasers. For, where an ancestor, by any sort of conveyance, appoints that, at his death, his heirs shall by gift from him come to that very inheritance which the law of descent casts upon them, it is construed as a vain and fruitless attempt to give that to the heirs, which the law itself vests in them. Thus, Lord Coke says, if a man make a gift in tail, or lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him.

2 Inst. 22 b.
Ferne Cont.
Rem. 66.
Tit. 81. ch. 4.
f. 26.

Words some-
times reject-
ed.

§ 13. Where there are any words in a deed that appear to be evidently repugnant to the other parts of it, and to the general intention of the parties, they will be rejected as insensible: for the words are not the principal things in a deed, but the intent and design of the parties.

Smith v.
Parkhurst,
3 Atk. 135.

§ 14. Thus, where lands were limited to the use of A. for 99 years, if he should so long live, and from and after the death of A., or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs during the life of A., to preserve contingent remainders. It was determined by all the Judges of the Court of King's Bench, that the words, "and from and after the death of A." should be

be rejected as insensible, and repugnant to the subsequent words. And this determination was affirmed in the House of Lords, by the advice of all the Judges.

6 Bro. Parl.
Ca. 351.

§ 15. An evident omission or mistake will be supplied in a deed: and, therefore, in a case, where the name of the bargainer was omitted in the operative part of a bargain and sale, yet it was supplied.

Omissions
supplied.

§ 16. *Nathaniel Lord Say and Sele* conveyed his estate to *B. K.* for the purpose of making him a tenant to the *præcipe*, by a deed of bargain and sale, which was worded in the following manner: “ Witnesseeth,
“ that, for and in consideration of 5 s. by the said *B. K.*
“ to the said Lord *S.* and *S.* in hand paid, as also for
“ the cutting off all intails, &c. and for settling and
“ assuring the same to the said Lord and his heirs,
“ doth bargain, sell, and confirm, unto the said
“ *B. K.*” &c.

Lloyd v.
Lord Say and
Sele, 1 Salk.
341. 10 Mod.
40.

The Court of King’s Bench was of opinion, that this deed passed the freehold, because such was the plain intention of it.

Upon a writ of error in the House of Lords, it was contended, that this bargain and sale could not convey any estate, because it was not mentioned therein, that any person did bargain and sell the lands in question. There appeared, indeed, the words bargain and sell, but it was not said who bargained and sold, and, consequently, Lord *S.* did not bargain and sell. On the other side, it was argued, that it appeared *prima facie*

4 Bro. Parl.
Ca. 73.

that the consideration money was paid by *B. K.* to Lord *S.*, and that it was for barring all intails and remainders in the premises, and assuring the same to Lord *S.* and his heirs. That it appeared as well by this deed itself, as by the evidence on the trial, that the manors and lands therein mentioned, were the estate of Lord *S.*, and that the intent of the deed was to make *B. K.* tenant to the freehold, in order that a common recovery might be suffered. And, therefore, the Court of King's Bench were unanimously of opinion, that the freehold was well conveyed, by the deed. The judgment was affirmed.

Where a Deed cannot operate in the Way intended, it will be allowed to operate some other Way. Shep. Tou. 82.

Vide ante Ch 12. f. 2, 3, 4.

§ 17. If a deed cannot operate in the manner intended by the parties, the judges will endeavour to construe it in such a way as that it shall operate in some other manner, it being a maxim of law, *quando quod ago non valet ut ago, valeat quantum valere potest*. In consequence of this principle, it has been determined, that a deed which was intended to operate as a lease and release, or bargain and sale, but could not take effect in that manner, was held to be good as a covenant to stand seised.

§ 18. So, where a conveyance was void as a lease and release, because the releasor had only a term for years in the lands, it was resolved, that it should operate as a grant and assignment.

Marshall v. Franks, Gilb. Eq. R. 143.

§ 19. A person, possessed of lands for a term of 999 years, did, for a valuable consideration, by lease and release, grant, bargain, sell, and demise them to trustees

trustees and their heirs, to the use of himself and his wife for their lives, remainder to the heirs of the wife; and covenanted that he was seised in fee.

The wife died without issue, having made a writing in the nature of a will, and thereby devised the lands to *B.* and his heirs.

It was argued, that nothing passed by this conveyance: for, it being only a term in gross, no use passed to the trustees by the statute 27 *Hen.* 8., which only raises a use out of a freehold; that no use passed by the lease for a year or bargain and sale; and, therefore, the release could not operate by way of enlargement. But the Lord Chancellor was of opinion, that, although this conveyance was void as a lease and release, yet the husband being in possession, and the word “grant” being inserted in the release, it should take effect as a grant or assignment of his whole interest at common law.

§ 20. A release will be construed to operate as a grant of a reversion, in order to effectuate the intention of the parties.

§ 21. *Robert Edwards*, being seised of a reversion in fee expectant on an estate for life, by deed of release did renounce, remise, release, and for ever quit claim all the said premises to *A.*, and the heirs male of his body, and all his right, title, and interest therein. It was contended, that nothing passed by the release in this case, for want of proper operative words: there

Goodtitle v. Bailey,
Cowp. 597.

were appropriated terms to every conveyance, and, where the word "grant" is used, being *genus generalissimum*, if the instrument cannot take effect according to its proper form, it shall operate in some other, if by law it can. But, here, the words are, "renounce, release, and quit claim," which are the special form of words adapted to a release only; therefore, it cannot operate as a grant; 1 *Inst.* 301. "A release cannot operate as a grant; because it is a peculiar manner of conveyance, adapted to a special end." In the case of *Roe v. Franmer*, the word "grant" was used, and so it was in the cases there cited; but, here, there was no such word, nor any thing equivalent to it; consequently, nothing passed by the deed.

Ante Ch. 12.
f. 6.

Lord *Mansfield*.—"The rules laid down in respect of the construction of deeds, are founded in law, reason, and common sense: that they shall operate according to the intention of the parties, if by law they may; and, if they cannot operate in one form, they shall operate in that, which by law will effectuate the intention. But an objection is made in this case, which, it is said, takes it out of the general rule, and the doctrine of the authorities cited; and that is, that in the release in question, the word *grant* is not made use of: but that the intention of the parties was, to pass all the right and title of the plaintiff in these premises, is manifest beyond a doubt."

Mr. Justice *Aston* observed, that this was the common wording of a release, but though in the shape of
a re-

a release, if there were sufficient words, it might operate as a grant.

Judgment was given upon another point.

§ 22. All modern deeds contain, in the granting part, a great number of the most operative technical words. Thus, in a release, the words “grant, bargain, sell, alien, release, and confirm,” are constantly used; because, if the conveyance should not happen to be good as a release, it may, notwithstanding, operate as a grant, a bargain and sale, or a confirmation.

§ 23. Where a deed may enure in different ways, the person to whom it is made, shall have his election which way to take it. As, if a deed of grant be made by the words “*dedi et concessi*,” this, in law, may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the choice of the grantee to plead or use it, the one way or the other.

Where the Grantee has an Election, how to take. Shep. Tou. 83.

§ 24. Sir R. Heyward, being seised in fee of the manor of D., &c. and of divers lands and tenements, whereof part was in demesne, part in lease for years with rents reserved, and part in copyhold, by indenture, in consideration of a sum of money paid to him by R. W. and E. P., demised, granted, bargained, and sold to the said R. W., &c. the said manors, lands, tenements, and the reversions and remainders of them, with all rents reserved on any demise, to hold to them and their assigns presently after the decease of the said

Heyward's Case, 2 Rep. 35 a.

R. Heyward, for the term of 17 years ; which indenture was acknowledged to be inrolled. And, afterwards, the said Sir *R.*, by another indenture, covenanted with *T. F.* and others, to stand seised of the premises to the use of himself and the heirs of his body, and no attornment was made under the first conveyance. The question was, whether the bargainees should have election to take by the bargain and sale *in toto*, or by the demise *in toto*, notwithstanding their general entry ; or whether the interest, which passed as an interest at common law, should be preferred before the raising an use. It was resolved by *Popham* and *Ander-son*, Chief Justices, and the whole court of wards, that *R. W.* and *E. P.*, had election to take it, either by demise at the common law, or by bargain and sale : for, where a person, seised in fee, for money, demises, grants, bargains, and sells his land for years, he, who is owner of the land, by his express grant, gives election to the lessee to take it by the one way or the other, for he hath sole power to pass it by demise or bargain ; and, therefore, the law will not make construction against such express grant, and, namely, in this case, where it would tend to the prejudice of the lessees : for, if the law should force them to take it by demise, then they would lose the rents reserved upon the leases for years.

It was also resolved, that this right of election continued, notwithstanding the alteration of the estate by the second indenture, the death of the lessor, and the queen's right to the wardship of the heir : and that, where an estate passes, and the donee or grantee has a
right

right of election, such right descends to his heirs or executors.

§ 25. Lord *Hobart* says, if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the authority; and so it must be taken, for *fictio cedit veritati*. But where interest and authority meet, if the party declare clearly that the act shall take effect from his authority, or power, there it shall prevail against his interest, for *modus et conventio vincunt legem*. Hob. R. 159. Vide ante Ch. 16. f. 59.

§ 26. Since the statute of frauds, no averment can be made in contradiction to a written agreement: and, even in the case of an *ambiguitas patens*, that is, an ambiguity which appears upon the face of the instrument, no averment is allowed. But, in the case of an *ambiguitas latens*, an averment supported by parol evidence is admissible. Hence Lord *Bacon's* maxim, 23. *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur*. In what Cases Averments are admitted. Treat. of Eq. B. 1. c. 3. f. 11. Thus, if a feoffment be made of the manor of S., and the feoffor has a manor called *North S.*, and another called *South S.*, parol evidence will be admitted to shew, which manor was meant. Bacon's Tra. 101. Vide 1 Bro. R. 338. 5 Bro. Parl. Ca. 166.

§ 27. Where the words of a deed are so uncertain, that the intention of the parties cannot be discovered, the deed will have no effect. Thus, a gift to *A.* or *B.*, or to one of the children of *J. S.*, he having four, is void for the uncertainty. Where a Deed is uncertain, it has no Effect. 2 And. R. 103.

§ 28. Lands

Windsmore,
v. Hobart,
Hob. R. 313.

§ 28. Lands were demised to *Thomas Hobart*, *habendum* to the said *Thomas* and to three others persons *successive*. It was resolved, that no one could take immediately, but *Thomas Hobart*, because he was the only party to the deed, and the rest were only named in the *habendum*; and that the others could not take by way of joint remainder on account of the word *successive*, and that they could not take in succession for the uncertainty who should take first, and who should follow.

Construction
of Convey-
ances to Uses,
Cro. Eliz.
208.

Leigh v.

Brace,

Carth. 343.

Makepeace v.

Fletcher,

Com. Rep.

457.

Goodtitle v.

Stokes,

1 Will. 301.

2 Vef. 252.

3 Atk. 734.

§ 29. It was formerly held, that conveyances to uses should be construed like wills, that is, according to the intention of the parties, though not expressed in the proper, legal, and technical words. In the case of *Rigden v. Vallier*, where the question was, whether in a covenant to stand seised the words were to be construed strictly, Lord *Hardwicke* said—"It is objected
" that there is no warrant to construe a deed to uses
" as to the limitations and words of it in a greater
" latitude than a conveyance at common law; and if
" construed in a different manner would cause great
" confusion, which I hold to be true in general, for
" the statute joining the estate and the use together,
" it becomes one entire conveyance, by force of the
" statute, and the words are to be construed the same
" way; but this is to be taken with some restriction,
" As to the words of limitation in a deed, they are,
" to be sure, to be construed in that manner, viz. in
" the same sense; but where they are words of regu-
" lation, or modification of the estate, and not words
" of limitation, I think there is no harm in giving
" them

“ them greater latitude in deeds on the statute of uses,
 “ which are trusts at common law, than in feoffments,
 “ which are strict conveyances at common law.”

§ 30. If it should be established that conveyances to uses, which are now become the common assurances of the realm, were to be construed in the same manner as wills, even with respect only to the words of regulation, or modification of the estate, such a doctrine would in some degree tend to introduce all that latitude and uncertainty, which now prevail in the construction of testamentary dispositions. Of this opinion was the late Mr. *Booth*, the most able conveyancer of the last century, who says in one of his opinions:—“ If deeds of uses must be governed by
 “ the same rules, as prevail with respect to wills, then
 “ a limitation to a man’s male descendant, or male
 “ children, may create an estate tail; and an absolute
 “ inheritance may pass by a limitation to the use of
 “ the grantee for ever; which will produce infinite
 “ confusion.”

Cases and
 Opinions,
 v. 2. 279.

§ 31. Mr. *Booth*’s opinion is fully confirmed by the late Lord Chief Justice *Willes* and his brethren, in the case of *Tapner v. Marlott*, where his Lordship says;—
 “ As to what was insisted upon, that a conveyance to
 “ uses is to be construed as a will, and in a different
 “ manner from other conveyances, we are all clearly
 “ of a contrary opinion: for, since the statute of
 “ uses, an use is turned into a legal estate to all intents
 “ and purposes. It must be conveyed exactly in the
 “ same manner, and by the same words; and, if it

Willes Rep.
 180.

“ were

“ were otherwise, as most conveyances are now made
 “ by way of use, endless confusion would ensue.”

2 Bro. R. 233.
 3 Term R.
 755.

Lord *Thurlow* and Lord *Kenyon* have fully assented to this doctrine.

Construction
 of Declara-
 tions of Trust.
Perne Cont.
Rem. 218.

§ 32. Declarations of trusts are construed in the same manner as other conveyances, where an estate is finally limited by a deed, without any kind of reference to a further execution of the trust, by a conveyance directed to be made: for, in such cases, any occasional conveyance, that may at any time be required of the legal estate from the trustees, may well be deemed a matter of form only; and not otherwise requisite than for the mere purpose of investing the subsisting trusts, whatever they may be, with their commensurate legal estates.

Idem.

§ 33. But a declaration of trust, whose effect is referred to another conveyance, directed to be made for its establishment, may reasonably be considered as left to some degree of modification, by that supplemental part of the deed, *viz.* the conveyance to which the completion of the trusts is referred: and such conveyance may be directed to be made, so as to effectuate the intentions of the person creating the trust, with less regard to the strict rules of construction, than in a case of a trust executed.

Construction
 of Articles.

§ 34. With respect to the construction of articles or agreements, it is different from that of regular conveyances: for articles are only considered by courts of equity as preparing something to be after-

wards completed. And it is the constant rule to look upon them as merely the heads of the points agreed upon between the parties, and as minutes drawn by them to lay before counsel, in order to direct and guide them to carry the intent and scheme of the parties into execution: and, when application is made to the Court of Chancery for that purpose, it will mould them in such manner as to comprehend what appears to be the manifest intent and design of the parties; not paying a nice adherence to the legal sense or operation of the words, which may be made use of in framing the articles.

Collect. Jur.
v. 2. 374.
2 Atk. 545.

§ 35. Having premised these general rules, we will proceed to the exposition of the several parts of a deed in their order.

Particular
Rules.

§ 36. With respect to the parties, if several persons join in a deed, some of whom are capable of conveying or taking, and others incapable; it shall enure and be construed as the deed of those only, who are capable of conveying, and to those only who are capable of taking: and the incapacity of some of the parties, will not render it invalid as to those who are capable.

Parties.
Shep. Tou.
81.

§ 37. Although a tenant for life can only grant his own life estate; yet, if he is joined in the conveyance by the remainder-man or reversioner, they may grant the whole inheritance. Thus, if a tenant for life, and the person in remainder or reversion, join in a feoffment in fee, it will be good: for each passes his own

1 Inst 42 a.
45 a.
1 Rep. 76 a.
6 Rep. 14 b.

own estate, the tenant for life the freehold in possession, and the reversioner his reversion.

Recital.
Shep. T. 76.
3 Cha. Ca.
101.

§ 38. With respect to a recital, although it is not a necessary or essential part of a deed, yet it may be made use of to explain any doubt which may arise respecting the intention of the parties ; but in itself it has no effect or operation, nor will it in general amount to an estoppel.

Shelley v.
Wright,
Willes R. 9.

§ 39. In a modern case it was resolved, that a party executing a deed is estopped by the recital of a particular fact in that deed, to deny that fact. And therefore, where it was recited in the condition of a bond, that the obligor had received divers sums of money for the obligee, which he had not brought to account, but acknowledged that a balance was due to the obligee : It was holden that the obligor was estopped to say that he had not received any money for the use of the obligee.

Grant.

§ 40. As to the granting part of a deed, the following rules are to be observed :

Shep. Tou.
89.

1st, When any thing is granted, all the means to attain it, and all the fruits and effects of it are granted also, and shall pass *inclusive*, together with the thing itself, without the words “ *cum pertinentiis* :” for it is a maxim in law, *cuicunque aliquid conceditur, etiam et id sine quo res ipsa non esse potuit*.

§ 41. Thus,

§ 41. Thus, if a man grants a piece of ground in the middle of his estate, he at the same time impliedly grants a way to come at it : and the grantee may cross his land for that purpose, without being guilty of a trespass ; and, if the grantee is obstructed, he has a remedy by action.

Fitz. N. B.
183.

§ 42. The incidents, which are necessary and appendant, will in most cases pass by the grant of the principal, without the usual word “ appurtenances,” but the converse of this proposition will not hold : for the principal will not pass by a grant of the incident. *Accessorium non ducit, sed sequitur suum principale.*

10 Rep. 64.

§ 43. As to the *habendum*, its office is only to limit the certainty of the estate granted : and, therefore, it is a rule, that no person can take an immediate estate by the *habendum* of a deed, when he is not named in the premises ; for it is in the premises of a deed, that the thing is really granted.

Habendum.

§ 44. Thus, if lands be given in the premises of a deed to a husband, *habendum* to him and his wife ; the wife will take nothing, because she is not mentioned in the premises.

Brooks v.
Brooks,
2 Roll. Ab.
67.
Windsmore
v. Hobart,
Ante f. 28.

§ 45. There are, however, some exceptions to this rule : 1st, If lands are given in frank marriage, the wife, who is the object of the gift may take by the *habendum*, although she is not named in the premises. 2d, A person, not named in the premises, may take an estate in remainder by the *habendum*. 3d, If no name

1 Inst. 21 a.

name whatever be mentioned in the premises, then a person named in the *habendum* may take.

1 Inst. 7 a.
2. 3.

§ 46. There is a case in 21 & 22 *Eliz.* where the two Chief Justices and the Chief Baron certified to the Chancellor, that a lease was good, though the lessee was named in the *habendum* only.

Sammes' Case,
13 Rep. 55.

§ 47. In conveyances to uses, a person not named in the premises might take by the *habendum*. As where Sir T. Beckenham, by indenture between him and John Sammes and George Sammes, bargained, sold, enfeoffed, &c. to John Sammes; to hold to the said John Sammes and George Sammes, their heirs and assigns, to the use of them and their heirs for ever: It was resolved, that, as George was not named in the premises, he could not take by the *habendum*; but, although the feoffment was good only to John and his heirs, yet the use, limited to John and George and their heirs, was good, because the seisin of John was sufficient to serve the use declared to George.

1 Roll. Ab.
65.

§ 48. Nothing can be limited in the *habendum* of a deed, which has not been given in the premises; because the premises being the part of a deed in which the thing is granted, it follows that the *habendum*, which is only used for the purpose of limiting the certainty and extent of the thing given, cannot increase the gift: for then the grantee would, in fact, take a thing which was never given to him.

§ 49. Thus,

§ 49. Thus, if a man grants a manor to *A. habendum*, together with the advowson of the church of *D.*; the advowson, if in gross, will not pass, because it was not given in the premises. But, if it is an advowson appendant to the manor granted in the premises, it will pass: for in that case, it was included in the grant of the manor.

Anon. 2 Roll. Ab. 65.

§ 50. Where the *habendum* is repugnant, and contrary to the premises, it is void, and the grantee will take the estate given in the premises. This rule is a consequence of the maxim already stated, that deeds shall be construed most strongly against the grantor, and therefore that he shall not be allowed to contradict or retract by any subsequent part of the deed, the gift made in the premises.

Where repugnant to the Premises.

§ 51. Thus, if lands are given in the premises of a deed, to *A.* and his heirs, *habendum* to *A.* for life, the *habendum* is void, because it is utterly repugnant to, and irreconcilable with the premises.

Plowd. 153.

§ 52. In the case of things which derive their effect from the delivery of the deed, without other ceremony, and which lie in grant, there the *habendum*, if repugnant to the premises, is void. As, if a man grants rent or common out of his land, in the premises of a deed, to one and his heirs, *habendum* to the grantee for years or for life, the *habendum* is repugnant and void: for a fee passed in the premises by the delivery of the deed.

2 Rep. 23 b.

2 Rep. 24 a.

§ 53. But when, to the estate limited by the premises, a ceremony is requisite to the perfection of the estate, and to the estate limited in the *habendum*, nothing is required to the perfection and essence thereof, but only the delivery of the deed; there, although the *habendum* be of a lesser estate than is mentioned in the premises, it shall stand.

Baldwin's
Case,
2 Rep. 23.

§ 54. Thus, where a person by indenture, covenanted, granted, and demised, and to farm let, lands, to *Ann Baldwin* and *Anthony* her son, and to the heirs of the said *Anthony*, *habendum* to them from the date of the said indenture, until the end of ninety-nine years; and so on from ninety-nine to ninety-nine years, until three hundred years were expired: no livery of seisin was made according to the said indenture. It was resolved, that, as livery was necessary to perfect the estate limited in fee, nothing would have passed but an estate at will, if the deed had not gone farther; but, as an estate for years was limited in the *habendum*, it was good presently by the delivery of the deed. And so it appeared to have been the intention of the parties, that the deed should take effect by the delivery.

Where it
enlarges,
abridges, or
explains the
Premises.
8 Rep. 154 b.

§ 55. There are, however, several cases, where the *habendum* is allowed to enlarge, abridge, or explain the premises; for it is a rule of construction, that, where a deed first speaks in general words, and afterwards descends to special words, if the special words agree with the general words, the deed shall be intended according to the special words.

§ 56. Thus,

§ 56. Thus, where no estate is limited in the premises, and an express estate for years is limited in the *habendum*, this will qualify the general intendment of the premises, by which an estate for life would otherwise have passed.

1 Inst. 183 a.
8 Rep. 154 b.

§ 57. The estate, given in the premises, may be enlarged by the *habendum*. Thus, where an estate is given in the premises to the grantee for life, *habendum* to him and his heirs, the grantee will take an estate in fee; for Lord Coke says, the *habendum* may enlarge the estate given in the premises, but not abridge the same.

1 Inst. 299 a.

§ 58. Although the nature of the estate, given in the premises, cannot be entirely altered by the *habendum*; yet it may be qualified by it: for in that case there will be no absolute repugnancy between the premises and the *habendum*.

§ 59. Thus, if lands are given in the premises, to A. and his heirs, *habendum* to him and the heirs of his body, he will only take an estate tail; because the *habendum* qualifies and restrains the general import of the word "heirs," to the lineal descendants of the grantee.

8 Rep. 154 b.

§ 60. Lord Coke says, if lands be given to B. and his heirs, if B. have heirs of his body, and if he die without heirs, that it shall revert to the donor, this is an estate tail, and it shall revert to the donor.

1 Inst. 121 a.

Thurman's
Case,
2 Roll. Ab.
68.

§ 61. If a person gives lands to *A.* and his heirs, *habendum* to him and the heirs of his body, remainder to a stranger in fee; this shall qualify and restrain the estate given in the premises, so as to reduce it to an estate tail: for, otherwise, the limitation of the remainder over would be void.

Pilkworth v.
Pyet,
T. Jones 4.

§ 62. Where lands were granted to *A.* and his heirs, *habendum* to him and his heirs for three lives; the *habendum* was construed, so as to abridge the estate given in the premises to an estate for three lives.

1 Inst. 183 b.
190 b.

§ 63. If a lease be made to two persons, *habendum* the one moiety to the one, and the other moiety to the other; the *habendum* makes them tenants in common, whereas by the premises, they were joint-tenants.

Where it is
not controlled
by the Pre-
mises.

§ 64. Where the premises and the *habendum* of a deed are equally clear and explicit, the former will not be controlled by the latter, but both will be allowed to have an operation; it being a rule of law, that a deed shall be construed in such a manner, that each part of it may be effectual, if they can stand together.

8 Rep. 154 b.

§ 65. Thus, if lands are given in the premises to a person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail with a fee simple expectant thereon: for it is a maxim, that *generalis clausula non porrigitur ad ea, quæ antea specialiter sunt comprehensa*. And, therefore, when the

deed

deed at first contains special words, and afterwards concludes in general words, both words, as well general as special, shall stand.

§ 66. In some cases, a gift to a person and his heirs, *habendum* to him and the heirs of his body, has been held to pass an estate tail, with a fee-simple expectant. As, where lands were given to husband and wife and to their heirs, *habendum* to them and the heirs of their bodies; it was held that the grantee took an estate tail, with a fee simple expectant; but Mr. *Hargrave* has observed, that this case was attended with circumstances, particularly shewing an intention to pass both: for there was a reservation of tenure to the lord paramount, which could not be, if only an estate tail passed to the donee, and the reversion had remained in the donor; for then the tenure must have been of the donor.

Turnman v. Cooper,
Cro. Jac. 476.

1 Inst. 21 a.
2. 2.

§ 67. The words, inserted in the *habendum*, for the purpose of shewing the quantity of estate intended to be given, are called words of limitation; in contradistinction to the words in the premises, by which the lands are given; and which are called words of purchase.

Words of
Limitation
and Purchase.

Thus Mr. *Fearne* says,—“ In general, words of purchase are those by which, taken absolutely without reference to, or connection with any other words, the estate first attaches, or is considered as commencing in the person described by them; whilst words of limitation operate by reference to,

Cont. Rem:
138.

“ or connection with other words, and extend or modify the estate given by those other words.”

Idem 107.

§ 68. Mr. *Fearne* had previously observed, that, when the word heirs, &c. operate only to expand an estate in the ancestor, so as to let the heirs described into its extent, and entitle them to take derivatively through or from him, as the root of succession, or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them, to the heirs described originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase.

§ 69. In some cases, the same words operate as words of purchase, and also as words of limitation. Thus, where lands are limited to *A.* for life, remainder to the right heirs, or heirs of the body of *B.*, these are words of purchase, inasmuch as they describe the persons who are to take the estate in the first instance; and are also words of limitation, for they give an inheritable quality to the estate, and limit the course of descent.

TITLE XXXII.

D E E D.

CHAP. XXIV.

The same Subject continued.—By what Words different Estates may be created.

- | | |
|---|---|
| <p>§ 1. <i>What Words create an Estate in Fee.</i>
 4. <i>The Word Heirs must be used.</i>
 8. <i>Exceptions.</i>
 14. <i>What Words create an Estate Tail.</i>
 25. <i>Limitation to A. and his Heirs, Remainder over.</i>
 29. <i>Limitation to A. and his Wife, and the Heirs of the Body of A. or his Wife.</i>
 36. <i>Effect of a Limitation to the Heirs of the Body of A.</i></p> | <p>40. <i>Usual mode of limiting Estates Tail.</i>
 42. <i>What Words create an Estate for Life.</i>
 43. <i>What Words create a Joint-tenancy.</i>
 46. <i>What Words create a Tenancy in common.</i>
 52. <i>What Words create Cross Remainders.</i>
 61. <i>What Words create a Condition.</i></p> |
|---|---|

Section I.

WITH respect to the words required by the law, to create an estate in fee simple, it is laid down by *Littleton*, § 1. and also by *Lord Coke*, that in all feoffments and grants, the word *heirs* is absolutely necessary for that purpose; and cannot be supplied by any other word whatever.

What Words
create an
Estate in Fee.

§ 2. *Mr. Madox*, in the dissertation which he has prefixed to his *Collection of Ancient Charters*, contends, that this maxim is not so old as is generally supposed, for that formerly there were several modes of expres-

tion by which an estate in fee simple might have been created, without the word *heirs*: such as to the feoffee *et suis*, or, *suis post ipsum*, or *habendum et jure hereditario perpetuo possidendum*. So that it is probable, this maxim was not fully established until the principles of the feudal law became generally adopted.

Inst. 23 b.

§ 3. The form of a gift in fee-simple, in *Bracton's* time, was, *habendum tali et heredibus suis de me et heredibus meis*, or, *tali et heredibus suis, vel cui terram illam dare vel assignare voluerit*, with a clause of warranty.

The Word
Heirs must be
used.

Tit. 11. ch. 4.
f. 2.

§ 4. It may, however, be now laid down as a general rule, that in all feoffments and grants to natural persons, and also in all conveyances deriving their effect from the statute of uses, no other word but the word *heirs*, however strong the intention may appear, will create an estate in fee-simple. And it is observable, that there is really no other word in the *English* language expressive of all the circumstances which constitute the idea of an heir.

Plowd. 28.
1 Inst. 8 b.

§ 5. A gift to a man, *et heredibus*, with livery of seisin, though the word *suis* be omitted, will pass an estate in fee-simple; because livery of seisin shall be taken most strongly against the person who makes it.

Idem n. 4.

§ 6. It is said by Lord *Coke*, that if lands are given to a man and to his heir, in the singular number, he will not take an estate in fee. But Mr. *Hargrave* observes, that, according to many authorities, heir may be

be *nomen collectivum*, and operate in the same manner as heirs in the plural number,

§ 7. It was determined in a modern case, that the words, to the use of all and every the child or children, equally, share and share alike, if more than one as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns for ever, should be construed so as to create an estate in fee in all the children; the words his or her heirs being allowed to operate as words of limitation on all the preceding words in the sentence.

Doe v. Martin, 4 Term, R. 39.

§ 8. The rule, that the word heirs is absolutely necessary to create an estate in fee-simple, admits of a few exceptions. Thus, if a father enfeoffs his son, to hold to him and his heirs, and the son re-enfeoffs the father as fully as the father enfeoffed him, an estate in fee-simple will pass; for, in this case, the mind is carried to the idea of an heir, as clearly as if the word heir had been inserted in the feoffment.

Exceptions.

1 Inst. 96.
a. 6.

§ 9. If one coparcener or joint-tenant releases all his right to the other, it will pass a fee, without the word heirs.

Idem.

§ 10. So, if one coparcener grants a rent to the other, for owelty or equality of partition, an estate in fee-simple in the rent will pass, without the word heirs; for, as the rent comes in lieu of the inheritance, it has as strong a relation to the inheritance as if the word heirs had been mentioned.

Id. 10 a.

§ 11. In

Ante ch. 8.
f. 23.

§ 11. In releases that enure by way of *mitter le droit*; we have seen, that the word heirs is not necessary to create an estate in fee-simple.

1 Inst. 9 b.

§ 12. In conveyances to corporations, whether sole or aggregate, the word heirs is not necessary to create an estate in fee-simple. But the law makes a distinction between a corporation aggregate and a sole corporation, for a feoffment to a corporation aggregate will pass a fee-simple, without any words of limitation whatever; whereas, in a feoffment to a corporation sole, an estate in fee will not pass without the word successors.

1 Inst. 9 b.

§ 13. In a grant to the king, an estate in fee-simple will pass without either the word heirs or successors; partly, on account of his prerogative, and, partly, because, in judgment of law, the king never dies.

What Words
create an
Estate Tail.
1 Inst. 20 a.

§ 14. With respect to the words which are necessary to create an estate tail in a deed, it is said by Lord Coke, that the word heirs is as necessary to the creation of an estate tail, as to that of an estate in fee-simple; for, as every estate tail was a fee-simple at common law, and as no fee-simple could be created without the word heirs, it follows, that an estate tail could not be created without that word.

1 Inst. 20 b.
Nevel v.
Nevel,
1 Roll. Ab.
387.

§ 15. Lord Coke says, if a person gives lands or tenements to a man *et semini suo*, or *exitibus vel proli-
bus de corpore suo*, to a man and to his seed, or to the issues or children of his body, he hath but an estate for
life;

life ; for, although the statute *De Donis* provides, that the will of the donor shall be observed, yet that will and intent must agree with the rules of law. And *Littleton*, in his reading on this statute, holds, that a gift to man *et exitibus de corpore suo legitime procreatis*, or *semini suo*, only passes an estate for life. This doctrine is still held to be law, the word issue never having been allowed to operate in a deed as a word of limitation.

Makepeace v. Fletcher,
Com. R. 457.
4 Ves. Jun.
794.

§ 16. No technical words are, however, required, to restrain the general import of the word heirs to the immediate descendants of the body of the donee, and, therefore, any words that shew the intention of the grant, will be sufficient for that purpose.

§ 17. Lord *Coke* says, if lands be given to *B. et hæredibus quos idem B. de prima uxore sua legitime procrearet*, this is a good estate in special tail, although he has no wife at the time, without the words *de corpore*. So it is, if lands be given to a man and to his heirs which he shall beget of his wife ; or to a man *et hæredibus de carne sua* ; or to a man *et hæredibus de se* : in all these cases, an estate tail is created, though the words *de corpore* are omitted.

1 Inst. 20 b.

§ 18. Lord *Coke* also says, that the word *engendres*, or begotten, may be omitted : and if the word be *procreandis*, or *quos procreaverit*, the estate tail is good : and, as *procreatis* shall extend to the issues begotten afterwards, so, *procreandis* shall extend to the issues begotten before. Lord *Hale* has observed on this passage, that

Idem n. 3.

that where the words were, *in posterum procreandis*, sons born before shall be excluded, on account of the peculiar force of *in posterum*.

Ch. 23. f. 59. § 19. It has been stated, that where lands are given in the premises of a deed to A. and his heirs, *habendum* to him and the heirs of his body, he will only take an estate tail.

Bro. Ab. Tit.
Devise 1.

§ 20. *Littleton* says, if lands are given to a man and his heirs males, or to a man and his heirs females, the donee will take an estate in fee; because the gift does not specify from what body the heirs male or female shall issue.

Abraham v.
Twigg.
Cro. Eliz.
478.

§ 21. A feoffment was made to the use of the feoffee and his heirs of his body, and, for default of such issue, to G. D., and to his heirs males lawfully engendered, and, for default of such issue, to the right heirs of the feoffor. All the Judges were of opinion, that G. D. took an estate in fee; and that it could not be an estate tail, because there was not any body from whom his heir male should come.

§ 22. But if there be any other words in a gift of this kind, from which an intention to restrain the generality of the words heirs males to the body of the grantee can be inferred, such gift will be construed to pass an estate tail.

Beresford's
Case, 7 Rep.
41.

§ 23. A feoffment was made to the use of the feoffor for life, remainder to the use of George Beresford, son and

and heir of the feoffor, and the heirs males of his body lawfully begotten; and for default of such issue to the use of *Aden Beresford*, and the heirs males of the said *Aden Beresford* lawfully begotten; and, for default of such issue, to the use of *Thomas Beresford*, &c.

The question was, what estate *Aden Beresford* took; and it was contended, upon the authority of *Abraham v. Twigg*, that he took an estate in fee-simple. But it was resolved by the court, that *Aden* took only an estate tail, because there were words equivalent to the words *de corpore*. Ante f. 21.

§ 24. Lord Coke says, if lands are given to *A. et haredibus de corpore suo*, remainder to *B. in forma prædicta*, this is a good estate tail to *B.*, for that *in forma prædicta* includes the other. If a man letteth lands to *A.* for life, remainder to *B.* in tail, remainder to *C.* in *forma prædicta*, it is void for the uncertainty; but if it had been in *eadem forma*, this had been a good estate tail; for, *idem semper proximo antecedenti refertur*. 1 Inst. 206.

§ 25. It is laid down by *Hales Justice*, *arguendo*, in 4 *Edw. 6.*, that if land is given to one and to his heirs, and if the donee die without heir of his body, that it shall remain to another, this shall be a good tail by the equity of the statute, although it be out of the words: and this doctrine has been confirmed by several cases. Limitation to *A.* and his Heirs, Remainder over. Plowd. 53. Vide Tit. 21 Ch. 1. f. 19.

§ 26. A feoffment was made to the first son who should have issue, and to his heirs, and, for default of such Beck's Case, Lit. Rep. 344.

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This was held to be an

is made to the use of the feoffor
 the use of his son *Thomas*, and
 and, for default of issue of the
Thomas, to the use and behoof of the
 feoffor. The court said, that the
 feoffor was plain, that an estate in fee-
 should be to his son. It was no more than if a
 gift had been made to a man and his heirs, *viz.* to the
 heirs of his body. And judgment was given, that it
 was only an estate tail.

Idle v. Cook,
 1 P.Wms. 70.

§ 28. In a subsequent case, where lands were limited
 to the use of *Valentine* and *Alice* his wife, *pro et durante*
termino vitarum suarum, et hæredum et assignatorum præ-
dictorum Valentini et Aliciæ, et pro defectu talis exitus,
 to the use of the right heirs of the grantor for ever.
 It was held by Lord Chief Justice *Holt*, *Powis*, and
Powell, that this was an estate in fee; contrary to the
 opinion of *Gould*, who thought it should be construed
 an estate tail, that being the intent of the grantor.

Limitation to
A. and his
 Wife and the
 Heirs of the
 Body of *A.*,
 or of his
 Wife.
 Lit. f. 26, 27,
 28.

§ 29. *Littleton* says, if tenements be given to a man
 and his wife, and to the heirs of the body of the man,
 in this case, the husband hath an estate in general tail,
 and the wife an estate for term of life. Also, if lands
 be given to the husband and wife, and to the heirs of
 the husband which he shall beget on the body of his
 wife, in this case, the husband hath an estate in special
 tail, and the wife but an estate for life. And if the gift
 be

be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to the husband and the wife, and to the heirs which the husband shall beget on the body of the wife, in this case, both of them have an estate tail; because this word, heirs, is not limited to the one more than to the other.

§ 30. Lord Coke has observed on this passage, that the word heirs is *nomen operativum*, to which of the donees it is limited, it createth the estate tail: but if it incline no more to the one than to the other, then both do take; and therewith accords the case 3 Edw. 3., where it appeared, *quod Robertus De S. dedit Johanni De Ripariis et Matildæ uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c*; and this was adjudged to be an estate in special tail in them both, because the estate was equally tailed to the heirs of the baron, as to the heirs of the wife.

1 Inst. 26 a.
n. 3.

§ 31. In conformity to the above passages, it has been long established, that where a limitation is made to the heirs of the body of the wife by the husband to be begotten, the wife will take an estate tail. But if the words are to the heirs upon or on the body of the wife, by the husband to be begotten, both husband and wife take an estate tail.

Fearne Cont.
Rem. 45.

§ 32. Thus, where the limitation was to the husband and wife for their lives, remainder to the first and other

Repps v.
Bonham,
Yelv. 131.

other sons of the body of the wife, remainder to the heirs of the body of the wife by the husband to be begotten, it was held an estate tail in the husband. But the court said, if it had been to the heirs which the husband shall beget *on* the body of the wife, it would have created an estate tail in both; for which, was cited 19 Hen. 6. 75 a. giving the same reason as *Littleton* does, because the word heirs is indifferently limited to both.

Goffage v.
Taylor, Sty.
325.

§ 33. *A.* levied a fine to the use of himself for life, then to his son for life, then to the use of the intended wife for life, remainder to the use of the heirs to be begotten upon the body of the wife by the son. It was adjudged, that the word heirs should be applied to the heirs of both parties, and, therefore, they both took estates tail.

Merrel v.
Rumsey,
3 Salk. 338.

§ 34. By a marriage settlement and fine levied to the use of husband and wife for their joint lives, remainder to the heirs of the body of the wife by the husband begotten, remainder (the wife surviving the husband) to her for life, remainder to the right heirs of the husband. *Per curiam*, this is an estate tail executed in the wife.

Denn v.
Gillot,
2 Term R.
431.

§ 35. A person, in consideration of marriage, covenanted to stand seised to the use of himself and *Mary* his intended wife for their natural lives, and the life of the longer liver of them, remainder to the use of the heirs *on* the body of the said *Mary* by the said husband lawfully to be begotten. Mr. Justice *Ashurst* said, the question

question depended on positive determinations, rather than on reasoning: if the words of the limitation had been, “the heirs *of* the body of the wife by the husband to be begotten,” the cases would be in favour of the plaintiff: but, as the word is *on*, and not *of*, all the determinations are the other way; particularly those in 3 *Edw. 3.*, and in *Styles*. If we are at liberty to go into the intention of the parties, I should have been inclined to have read the word *of* instead of *on*, because the wife ought to be considered as a purchaser; but we are tied down by express authorities.

It was unanimously resolved, that this was a joint estate tail in the husband and wife.

§ 36. An estate tail may be created by a limitation to the heirs of the body of *A.*, provided *A.* be dead when the limitation takes effect, and will vest in the person answering the description of such special heir; and, in case of his death without issue, will go to the person who would be entitled to such estate, if it had originally vested in the ancestor of the first taker.

Effect of a Limitation to the Heirs of the Body of *A.*

§ 37. *John De Mandevill*, by his wife *Roberge*, had issue *Robert* and *Mawde*. *Michael De Merwell* gave certain lands to *Roberge*, and to the heirs of *John Mandevill* her late husband, on her body begotten; and it was adjudged, that *Roberge* had an estate but for life, and the fee-tail vested in *Robert*, (heirs of the body of his father being a good name of purchase); and that, when he died without issue, *Mawde* the

Mandevill's Case, 1 Inst. 26 b. Id. 220 a.

Southcot v. Stowell, 2 Mod. 207.

daughter was tenant in tail, as heir of the body of ~~her~~ father, *per formam doni*.

Cont. Rem.
110.

§ 38. Mr. *Fearne* observes, that this devolution, after the decease and failure of issue male of the first special heir of *B.*, to other heirs equally falling within the same description, has been stiled a descent *per formam doni*. But this sort of acquisition of, or succession to, an estate tail, by the heirs male of the body of *A.* in a collateral line between themselves, is not strictly a descent; nor does it operate as a purchase. It is not strictly or completely a descent, because the estate never attached, or by possibility could attach in the ancestor, or be derived from or through him. It has not the effect of a purchase, because the estate goes in the same course of succession as it would have done under a descent, exclusive of persons to whom it would have gone, if the heirs male had taken absolutely by purchase.

Id. 112.

§ 39. In a subsequent paragraph, Mr. *Fearne* says,
 “ It seems, in truth, of a compound or intermediate
 “ description betwixt a descent and a purchase. In
 “ point of acquisition, it has the quality of the latter,
 “ as not being derived from or through the ancestor.
 “ But, in regard to its course of devolution, it is re-
 “ ferrable to the former, as pursuing the very same
 “ channel of transmissive succession. It is a sort of
 “ intail, which, though it first attaches in the special
 “ heir, according to the nature of the description, yet
 “ terminates not in him and his representatives, of
 “ the

“ the species denoted, but continues its progress
 “ through the whole race of heirs described, in the
 “ same course as if it had been an estate vested in the
 “ ancestor, descendible from him to his heirs, of that
 “ description.”

§ 40. The usual mode of limiting estates tail in modern conveyances, is, to the use of the first son of the body of the said *A. B.* on the body of the said *C. D.* lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the second, third, and all and every other the son and sons of the body of the said *A. B.* on the body, &c. lawfully to be begotten, severally, &c. and of the several and respective heirs male of the body and bodies of all and every such son and sons issuing; and, for default of such issue, &c.

Usual Mode
 of limiting
 Estates Tail.

§ 41. In a modern case, there was a limitation in a feoffment to the use of *Nicholas Smyth* for life, remainder to the use of the first son of the body of *Nicholas Smyth* lawfully issuing; and, for default of such issue, to the use and behoof of the second, third, fourth, and of all and every other son and sons of *Nicholas Smyth* lawfully issuing, severally and successively in remainder, &c. and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, &c. Upon a case sent from the Court of Chancery to the Common Pleas, respecting the estate which the eldest son of *Nicholas Smyth* took under this limitation, Lord Chief Justice *Eyre* said:—
 “ I think this is one of the clearest cases I ever saw:

Owen v.
 Smith,
 2 H. Black.
 Rep. 594.

“ there is demonstration plain on the face of the feoff-
 “ ment, that it was the intent of the parties that an
 “ estate tail should be limited to the eldest son of *Ni-*
 “ *cholas Smyth* : the argument, on the part of the de-
 “ fendant, has occasionally shifted ; sometimes admit-
 “ ting the intent, but contending, that the words used
 “ were not sufficient to effectuate that intent, which I
 “ thought was the true way of considering the ques-
 “ tion, and sometimes denying the intent itself. But
 “ no man can read this deed without seeing the intent
 “ I have mentioned ; though, by some strange blun-
 “ der, the usual words are omitted. If, indeed, it had
 “ stopped at the limitation to the first son of *Nicholas*,
 “ I should have agreed with the counsel for the de-
 “ fendant : for it certainly does not follow, that, be-
 “ cause we can see an intent on the face of a deed,
 “ therefore that the words used are sufficient to effec-
 “ tuate that intent. But the intent here, does not
 “ rest on the first expressions ; but the other parts of
 “ the deed, respecting the trusts and other limitations,
 “ refer to an estate tail in the first son of *Nicholas*
 “ *Smyth*. The intent, then, being plain, the question
 “ is, whether we can find sufficient words ? I, for
 “ one, adhere to the rule, which forbids the raising
 “ estates by implication in deeds ; and think that we
 “ ought not to grant the same indulgence to inaccuracy
 “ in the construction of deeds, as we do in wills.
 “ But, here, it is not necessary to resort to implica-
 “ tion, or to enquire whether the same latitude is to
 “ be allowed to conveyances to uses, as to wills : for,
 “ here, there are strict technical words, capable of
 “ being applied to the limitation of the first son of the
 body

“ body of *Nicholas Smyth*, so as to give him an estate
 “ tail. The limitation is to the first son ; and, for de-
 “ fault of such issue, the whole line of sons is taken
 “ in, without any particular limitation to them and
 “ the heirs of their bodies *nominatim* ; but it is “ to
 “ the several heirs male of the body and bodies of all
 “ and *every such* son and sons respectively issuing,”
 “ Fortunately it is not said, “ to the heirs male of the
 “ body and bodies of *such second, third, and other*
 “ sons, &c.” If it had been so, it could not, per-
 “ haps, have been got over. But the limitation is to
 “ the heirs male of the body and bodies of “ *every*
 “ *such son.*” Now, the case of *Doe v. Martin*, is an Ante f.
 “ authority to warrant the application of those words
 “ to the limitation of the first son of *Nicholas Smyth*,
 “ as well as to the others. But this case is stronger
 “ than *Doe v. Martin* : for it does not even require
 “ the assistance of punctuation. Upon the whole,
 “ therefore, it is clear, that the plaintiff took an
 “ estate tail under the limitation in the deed to the
 “ first son of the body of *Nicholas Smyth.*”

The certificate accordingly stated, that the plaintiff took an estate in tail male, in the lands in question.

§ 42. With respect to the words which are neces-
 sary to create an estate for life, those usually inserted
 for that purpose, are—to hold to the said *A. B.* and
 his assigns, for and during the term of his natural
 life. But it has been already observed, that if a feoff-
 ment be made to a natural person, without any words
 of limitation whatever, the feoffee will take an estate

What Words
create an
Estate for
Life.

Ante ch. 23
f.

Tit. 3. f. 5.

for his own life, unless the feoffor be only tenant in tail, or tenant for his own life, in which cases the feoffee will take an estate for the life of the grantor only.

What Words
create a Joint-
tenancy.

Tit. 18. ch. 1.
f. 3.
Sammes?
Case,
13 Rep 55.

§ 43. With respect to the words which are necessary to create a joint-tenancy, it has been already stated, that where lands are granted to two or more persons, to hold to them and their heirs, or for term of their lives, or for term of another's life, without any restrictive, exclusive, or explanatory words, all the persons named in such instrument, to whom the lands are so given, take an estate in joint-tenancy.

Ward v.
Everett,
1 Ld. Ray.
422.

§ 44. Sir Robert Car granted an annuity or annual rent of 100 l. to five persons for their lives, and the life of the survivor, to be equally divided among them, viz. 20 l. for each of them during their lives, and after that the first of them should die, that her part should be divided equally among the survivors. It was resolved that this was a joint-tenancy.

Staples v.
Maurice,
4 Bro. Par.
Ca. 580.

§ 45. Sir Robert Staples covenanted in consideration of marriage, to lay out 2000 l. in the purchase of lands of inheritance, to be settled to the use of himself for life, remainder to his intended wife for life, remainder to the use of their heirs of both their bodies. And covenanted that the leases for years, whereof he was then possessed, should be to the use of himself for life, and after his decease to the use of and in trust for the children of the said Sir Robert, begotten on the body of his said intended wife. It

was decreed by the Court of Exchequer, in *Ireland*, that the children of Sir *Robert Staples* took as tenants in common. But this decree was reversed by the House of Lords; where it was held that they took as joint-tenants.

§ 46. With respect to the words which are necessary to create a tenancy in common, the first and most usual mode of raising an estate of this kind, is, by limiting an estate to any number of persons, to take expressly as tenants in common, and not as joint-tenants. The second is, by limiting one moiety or third, to one of the grantees, another moiety or third to another of the grantees, and so on.

What Words create a Tenancy in Common.

Tit. 20. f. 8.
Vide ante
ch. 23. f.

§ 47. Where an estate is limited to two or more persons, equally divided, or equally to be divided, these words will create a tenancy in common.

2 Vent. 365.
Hamel v.
Hunt,
Prec. in Cha.
164.

§ 48. A person surrendered a copyhold estate to the use of his wife for life, and after her death to the use of his three younger sons and two daughters, equally to be divided, and their respective heirs and assigns for ever. The question was, whether these words created a tenancy in common or a joint-tenancy.

Fisher v.
Wigg,
1 P. Wms.
14.
1 Ab. Eq. 291.

Gould, Just.—The sons and daughters take as tenants in common, and not as joint-tenants. In the construction of deeds this rule is to be observed, viz. to make all parts of them take effect, according to the intent of the parties, so as it be not contrary to the rules of law; and it will not be inconsistent with any

rule of law to construe this a tenancy in common, the words upon which we are to judge being, not words of limitation or creation of an estate, but of qualification and correction. There are no precise words requisite to make a tenancy in common; the words, equally to be divided, go to the quality of the estate, and not to the limitation of it, a joint estate in the premises may be altered by the *habendum*. The intention of the surrenderor was to make a provision for his younger children and their heirs, which will not take effect if it be a joint estate. Surrenders of copyhold lands, to uses, shall have the same favourable construction as wills, and are not to be tied up to the strict rules of the common law, but expounded according to the intent.

Tourton, Just.—Of the same opinion.

Holt, Ch. Just. *contra*.—Surrenders of copyholds must be governed by the same rule as conveyances at common law. By this surrender, the sons and daughters are joint-tenants, not tenants in common; for the words, equally to be divided, signify no more than the law would have implied without them, and therefore they can have no operation. The true difference between joint-tenants and tenants in common is, that joint-tenants hold by one title, and tenants in common by several titles. In this case the title is joint, and all claim under the same conveyance; the word equally does not alter the manner of taking the profits. Judgement that the estate was a tenancy in common.

§ 49. A person by deed poll, gave, granted, and confirmed, in consideration of natural love and affection, to his two daughters, the rents and profits of certain lands during the life of his wife, equally to be divided between them, paying five shillings *per annum* to his wife, and after her decease, his two daughters to have the said lands to them and their heirs for ever, equally to be divided between them.

Rigden v.
Vallier,
2 Vef. 252.

Lord *Hardwicke* said, there was no solemn determination that he could find, that, equally to be divided, would not make a tenancy in common in a deed, though it was said over and over again, to be sufficient in a will, though not in a deed. The only solemn determination then was, *Fisher v. Wigg*, which was relied on, that in a surrender of copyhold to uses, those words made a tenancy in common; but it was objected to as a doubtful authority, as but the opinion of two Judges, against so great a man as *Holt*. And it was further said to be apprehended, that judgment was reversed. On search, he could not find it to be so, or that a writ of error was brought; so that judgment stood, and was so far an authority, that, that was the construction in the case of a surrender of copyhold lands. On the best consideration he was inclined to be of opinion, in this case, that it was a tenancy in common, and that it would be a direct contradiction to the manifest intent of this father, who was providing for his children, to say otherwise. He had considered the arguments in *Fisher* and *Wigg*, and it was truly said at the bar, that there was nothing more to be said on either side, than was said there.

Though

Though no one had more reverence for the opinion of Lord *Holt* than he had, yet he thought the arguments of the other Judges more founded on the nature and reason of the thing, and that *Holt's* was more founded on artificial arguments of the law, and drawn out from a great deal of fine learning, from arguments in other cases. *Gould's* argument had great weight, and was not to him satisfactorily answered.

Decreed to be a tenancy in common.

Goodtitle v.
Stokes,
1 Will. R.
341.

§ 50. *John Gurl*, by indentures of lease and release, conveyed the lands in question to trustees, to the use of himself and his wife for life, remainder to the use all and every the children of *John Gurl*, and their heirs, equally to be divided amongst them.

The question was, whether by the words equally to be divided amongst them, they should take as tenants in common, or as joint-tenants.

Lord Chief Justice *Lee* delivered the unanimous opinion of the court, that this being a deed of uses, must be construed according to the intent of the parties, which most plainly was, that the children should take in common. And they relied on the case of *Fisher v. Wigg*, which his Lordship observed, was never reversed, notwithstanding what was said in 1 *Ab. Eq.* 291.

His Lordship also cited the case of *Rigden v. Vallier*. And judgment was given that the words equally to be divided, in a deed of uses, created a tenancy in common.

§ 51. In

§ 51. In a modern case, Lord *Mansfield* said, the opinion of the two Judges, in *Fisher v. Wigg*, who differed from *Holt*, appeared to be the better one, more liberal, and better founded in law. And Mr. Justice *Aston* observed, that the words equally to be divided, had been determined to be a tenancy in common in a deed. Cowp.R.660.

§ 52. When lands are given in undivided shares to two or more persons, for particular estates, so as that upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the remainder-man or reversioner is not let in till the determination of all the particular estates, then the grantees take their original shares as tenants in common, and the remainders limited among them, on the failure of the particular estates are known by the appellation of cross remainders. But no technical words are required to create cross remainders; any form of words, which sufficiently indicate the intention of the parties, will be sufficient for this purpose,

What Words
create Cross
Remainders.
1 Inst. 195 b.
a. 1.

§ 53. The limitations in a deed were to trustees, to the use of *A.* and *B.* for their lives, remainder to the use of the child or children of *B.* in tail, as tenants in common; and, in case any such child or children should die without issue of his or her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of *B.* and the heirs of his, her, or their bodies, issuing; and, in case

Doe v.
Wainwright,
5 Term. Rep.
427.

case all the said children should die without issue, then to *A.* in fee.

Lord *Kenyon*.—" This case does not involve any
 " question respecting the raising of limitations by im-
 " plication ; because the deed, on which the question
 " arises, contains express limitations by way of cross
 " remainders, not indeed in the formal language used by
 " conveyancers, but in terms sufficiently denoting that
 " it was the intention of the parties to the deed, that
 " there should be cross-remainders as to some of the
 " children. Therefore all the cases, which were cited
 " by the defendant's counsel, to shew that cross-
 " remainders in a deed cannot be raised by implica-
 " tion, may fairly be laid out of the case ; because
 " this case, when considered, does not resolve itself
 " into any question of that kind. No technical pre-
 " cise form of words is necessary to create cross-
 " remainders : it is sufficient to say that there shall be
 " cross-remainders ; though, in the verbosity of
 " conveyancers, an abundance of words is generally
 " introduced in deeds for this purpose. Here the
 " single question arises upon the meaning of the
 " word "*surviving*;" which, indeed, is the only
 " word that distresses the case. But, taking the
 " whole context together, I do not think that word
 " renders the case doubtful. The fair construction of
 " that word, standing in the context, is, that, on the
 " death of one child without issue, that portion shall
 " go to the surviving line of heirs, and not merely to
 " one child surviving : it must go to the surviving
 " children in their own persons, if living, or if dead
 " to

“ to their issues ; and, in putting this construction, I
 “ do not think we proceed on conjecture merely :
 “ for the construction of the sentence is, and in case
 “ *all* the said children should die without issue, then
 “ the remainder is limited to *A.* in fee. We cannot
 “ give effect to the word *all*, without determining that
 “ there must be cross-remainders, not only as long as
 “ the individual children, but as long as the several
 “ lines of those children exist. Therefore the share
 “ of *J. W.*, which went over on his death without
 “ issue, went to the only surviving child, and the
 “ heirs of the body of the other child, who was at
 “ that time dead, having left issue, as tenants in com-
 “ mon. The whole context requires this construc-
 “ tion ; and the last clause cannot be satisfied without
 “ any other.”—The other Judges agreed.

§ 54. It is a fundamental rule of law, that cross-remainders cannot be implied in a deed : and Mr. Serjeant *Williams* observes, the reason of this rule is to be found in the case of *Nevell v. Nevell* ; where it is said, that if a man make a feoffment in fee to the use of *J. S.* and *J. D.* and the heirs males of their bodies ; and, for default of issue of either of them, to the use of the survivor of them, having issue male, and to the issue male of such issue male ; and, for default of issue male of their body, remainder to another. By this gift, *J. S.* and *J. D.* have several inheritances ; and no cross-remainder is raised by the words after, for want of the word *heirs* : for, though it be by way of use, yet an estate tail cannot be raised without the word *heirs*.

1 Saund. R.
 185 n.
 1 Roll. Ab.
 387.

Cole v. Le-
vington,
1 Vent.
Rep. 224.

§ 55. In ejectment upon a long and special verdict, the following points were resolved by the court, and declared by Lord *Hale* as the opinion of himself and the rest of the Judges :

That, where one covenants to stand seised to the use of *A.* and *B.* and the heirs of their bodies, of part of his land, and, if they die without issue of their bodies, then to remain, &c., and of another part of his land to the use of *C. D.* and *E.*, and the heirs of their bodies ; and, if they die without issue of their bodies, then to remain, &c. that, here, there are no cross-remainders created by implication ; for there never shall be such remainders upon the construction of a deed, though, sometimes, there are, in the case of a will.

Doe v.
Dovell,
5 Term Rep.
518.

§ 56. *A.*, a grandfather, after the marriage of his son *B.*, who had two children then living, conveyed lands by deed to trustees, to the use of himself for life ; remainder to *B.* for life ; remainder to trustees to preserve contingent remainders ; remainder to the use of such child or children of *B.*, and in such shares, &c. as *B.* should appoint ; and, in default of appointment, “ to the use of all and every the children of *B.*, and “ the heirs of their several and respective bodies, as “ tenants in common ; but, if only one child, to the “ use of such only child, and the heirs of his, her, “ or their body, remainder to the right heirs of *A.* in “ fee.” *B.* had other children, and died without having made an appointment. It was held, that *B.*’s children took vested interests as tenants in tail, and that

that there were no cross-remainders between them; but, on the death of each child without issue, his share fell into the reversion.

§ 57. By a settlement, made previous to a marriage, lands were limited to the use of all and every the daughter and daughters of the body of the husband on the body of the wife to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and, for default of such issue, to the use of the right heirs of the husband.

Doe v.
Worsley,
1 East. R.
416.

A question arose upon this settlement, whether there were cross remainders between the daughters or their issue.

Lord *Kenyon* observed, “ that this was the case of
“ a deed; in which, by the practice of centuries, no
“ such implication can be raised. And it would be
“ of most dangerous consequence to have this point
“ disputed, upon which so many titles must depend.

“ It is probable, that it was intended, that no part
“ of the settled estate should go over as long as there
“ were any issue of the marriage remaining; but the
“ parties have not said so. There are certain words
“ used to express such an intention in deeds, which
“ are well known: those have not been adopted in
“ the present case, but the framers of this settlement
“ have left that intention to be implied from other
“ words,

Saund. Rep.
185. n. 6.

“ words, which cannot be done. I will not go through
 “ all the cases, because they are collected with great
 “ ability by Mr. Serjeant *Williams*, in a note in his
 “ edition of *Saunders's Reports*, to which I refer in
 “ general. They establish the proposition I have be-
 “ fore laid down, in respect to the construction of
 “ deeds, which never has or can be suffered to be
 “ doubted, without affecting an infinite proportion of
 “ the property of the kingdom, and removing land-
 “ marks.”

Mr. Justice *Lawrence* observed, “ that, in order to
 “ raise cross-remainders in a deed between the issue of
 “ the first takers, there must be a limitation to the
 “ heirs of the body, which is not necessary in a will.
 “ And Mr. Justice *Le Blanc* remarked, that it was not
 “ sufficient in a deed, that one may collect such an in-
 “ tention of the parties from the words; but cross-
 “ remainders must be expressly limited by proper
 “ words of conveyance.”

It was resolved, that no cross-remainders were cre-
 ated in this case.

West v.
Erisley,
2 P. Wms.
349.

§ 58. In the case of marriage articles, the construc-
 tion is different; because the particular or technical
 words, made use of in marriage articles, are of no sig-
 nification, any more than as they serve to convey the
 general intention of the parties.

Twisden v.
Lock,
Amb. 663.

§ 59. By articles, entered into previously to a mar-
 riage, the intended husband covenanted to transfer
 stock

stock to trustees, to be laid out in the purchase of land, to be settled to the use of the husband and wife for their lives; and, after the death of the survivor, to the use of all the children male and female of their bodies, equally, as tenants in common, and their respective issue; and, for default of such children and their issue, to the use of the heirs and assigns of the survivor of the husband and wife.

Lord *Camden* said, “ he was clear there could not
“ be cross-remainders by implication in a deed; that
“ this was not the case of a settlement compleated,
“ but of articles executory. By the first part of the
“ articles, which considered the fund as money, no-
“ thing was to go over till the children were dead
“ without issue: this would assist him in construing
“ the limitations of the land. As the survivor of the
“ husband and wife was to take nothing in the money,
“ till all the children were dead without issue, so,
“ they should not take any interest in the reversion of
“ the land, but in the same way.”

His Lordship decreed, that there were cross-re-
mainders.

§ 60. By articles of agreement, made between
Charles Duke of Richmond and *William Earl of Ca-*
dogan, previously to the marriage of *Lord March* the
Duke of *Richmond*'s eldest son with *Lord Cadogan*'s
daughter, *Lord Cadogan* covenanted to lay out 60,000 *l.*
in the purchase of lands, to be settled on *Lord March*
and his intended wife for life, remainder to the children

Duke of
Richmond's
Case, Coll.
Jur. Vol. 2.
347.

of the marriage, as the father and mother should appoint, and, for want of appointment, to all the children, (the eldest excepted), equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, and to the several and respective heirs of their respective bodies issuing; and, for want of such issue, to the use and behoof of such eldest son in tail, remainder over.

Lord *March*, who was afterwards Duke of *Richmond*, had issue by this marriage an eldest son, and six younger children; but no appointment was made.

By a private act of parliament, the lands, purchased with the 60,000 *l.*, were vested in the eldest son, upon his engaging to pay the portions of the younger children; and, in this act, it was recited, that the younger children were entitled to the lands under the marriage articles, as tenants in common in tail, with cross-remainders of their respective shares.

One of the younger children died under the age of 21 years; and the question was, whether the portion of the child so dying became vested in the surviving younger children, or went to the eldest son.

Lord Chancellor *Apsey* decreed, that the words of the articles imported, that cross-remainders should be limited to the younger children; it being perfectly plain, that the eldest son was never intended to take any share of the 60,000 *l.*, so long as there remained a younger child in being to take: for, if there had
been

been one younger child only, that child must have taken the whole.

§ 61. With respect to the words which are necessary to create a condition, Lord *Coke* says, the proper ones are *sub conditione*, upon condition; but there are several other words and modes of expression that will create a condition, if it appears to have been the intention of the parties to give them that effect.

What Words
create a Con-
dition.
1 Inst. 202 b.

§ 62. The word proviso, provided always, &c. will also create a condition; but where it is used to make an estate conditional, three things are to be observed: 1st, That the proviso do not depend on another sentence, nor participate thereof, but stand originally of itself. 2d, That the proviso be the words of the bargainor, feoffor, donor, &c. 3d, That it be compulsory to enforce the bargainee, feoffee, donee, &c. to do an act.

2 Rep. 70 b.

§ 63. Lord *Coke* says, if a man by indenture lets lands for years, provided always and it is covenanted and agreed between the said parties, that the lessee shall not alien. It was adjudged, that this was a condition by force of the proviso, and a covenant by force of the other words.

1 Inst. 203 a.

§ 64. Where a lease was made by indenture with this clause, and it is covenanted between the parties, or, it is agreed between the parties, that the lessee shall not do a particular thing upon pain of forfeiture of the estate. This was adjudged to be a good condition.

1 Roll. Ab.
407.

Whichcock
v. Fox,
1 Roll. Ab.
408.

§ 65. So, where a lessee covenanted and granted with the lessor, that he would not grant, assign, or sell the land to any person, upon pain of forfeiture of the term, this was deemed to be a good condition.

Idem.

§ 66. But a proviso added in the end of a covenant, extends only to defeat the same covenant; unless there are words *quod tunc*, the grant shall be void.

Hamington
v. Pepul, Id.

§ 67. A lease was made of a farm, except the wood, and the lessor covenanted, that the lessee should take all manner of underwood; provided always and the lessee covenants that he will not cut any manner of timber trees. This is no condition, being but a declaration of what wood he was to meddle with.

Dyer 6 a.

§ 68. A lessee for years covenanted, that if he, his executors, or assigns, sold the term, that then the lessor might re-enter. This was held not to be a condition, for all conditions ought to be reserved and made on the part of the lessor, donor, &c.

Molington v.
Philpot,
Dal. 86.

§ 69. But where *A.* made a lease to *B.*, wherein it was covenanted between the said parties, that if it happened the said rent was behind for six weeks, then it should be lawful for *A.* to re-enter. *Dyer* held, that these words made a condition, because they were the words of the lessor, as well as of the lessee.

Tit. 13. ch. 1.
f. 10

§ 70. It has been already stated, that no precise technical words are required to make a condition precedent or subsequent, as the construction must always be founded on the intention of the parties.

§ 71. There

§ 71. There are many cases in which clauses that appear to create a condition operate as limitations.

Thus, Lord *Coke* says, if a man makes a lease *quo- usque*, that is, until *J. S.* come from *Rome*, this is a limitation, and not a condition. 1 Inst. 214 b.

So, if a man makes a lease to a woman *quamdiu casta vixerit*, or if a man makes a lease for life to a widow, *si tamdiu in pura viduitate viveret*, or if a man makes a lease for 100 years, if the lessee live so long, these are limitations, and not conditions. Id.

TITLE XXXII.

D E E D.

CHAP. XXV.

The same Subject continued.—Of the Rule in Shelley's Case.

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|--|--|
| <p>§ 1. <i>Origin of the Rule.</i>
 5. <i>The Rule stated.</i>
 11. <i>Mode in which mediate Limitations are vested.</i>
 14. <i>Of Joint and several Limitations.</i>
 22. <i>Both the Estates must be created by the same Instrument.</i>
 28. <i>It is the same, where the Ancestor takes by Implication.</i></p> | <p>§ 30. <i>The Rule not extended to the Word: Son, &c.</i>
 31. <i>Nor to the Word Heir in the Singular Number.</i>
 33. <i>Nor where the Estates are of different Natures.</i>
 35. <i>Nor to Cases of Marriage Articles.</i>
 47. <i>The Rule adopted in Assignments of Terms for Years.</i>
 50. <i>Unless there are superadded Words.</i></p> |
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Section 1.

Origin of
the Rule.

WHERE an estate was conveyed to *A.* for life, remainder to the heirs, or heirs of the body of *A.*, if the construction had been made according to the strict meaning of the words, and the plain intention of the grantor, *A.* would have taken only an estate for life, and the remainder to the heirs, or heirs of the body of *A.*, would have been considered as words of purchase, giving a contingent remainder to the heirs, or heirs of the body of *A.*, according to the rule of law, that *nemo est hæres viventis* ; but it was found, that this construction would be attended with several inconveniencies, and productive of great injustice.

§ 2. For,

§ 2. For, first, the lord of the fee would be defrauded of the wardship and marriage of the heir, because, in that case, the heir would take as a purchaser, without claiming any thing from his ancestor, by hereditary succession.

§ 3. Secondly, The remainder to the heirs, or heirs of the body being contingent until the death of the tenant for life, the inheritance was in suspension or abeyance. And, it has been already observed, that this was never allowed but in cases of absolute necessity; because the abeyance of the inheritance created a suspension of various operations of law, particularly of the remedies for the recovery of lands by real actions. Tit. i. f. 56.
Blackst. Arg.
Harg. Tracts,
498.

§ 4. Thirdly, If the remainder, in those cases, was construed to be contingent, no alienation could take place in the lifetime of the ancestor. Idem 510.

§ 5. To remedy these inconveniencies, it appears to have been very early established as a rule of law, that, “when the ancestor, by any gift or conveyance takes an estate of freehold, and, in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs, in fee or in tail, that always, in such cases, (the heirs), are words of limitation of the estate, and not words of purchase.” From which, it follows, that such remainder is immediately executed in possession, in the ancestor so taking the freehold, and is not contingent or in abeyance. The Rule
stated.
1 Rep. 104 a.

Black-
stone, Edw. 2.
577.

§ 6. The first case, according to Sir William Blackstone, wherein this principle was established, is thus translated by him from the *Year Book* of Edw. 2.

John Abel having two sons, *Walter* and *John*, purchased the manor of *Fortysgray* in *Kent*, to hold to himself and *Matilda* his wife, and *Walter Abel* his eldest son, and to the heirs of the body of *Walter* begotten, and if *Walter* died without heir of his body, the manor should remain to the right heirs of *John* the father. *Matilda* the wife died, and *Walter* the son also died without heirs of his body. *John* the father became bound in a statute merchant, to pay 100 *l.* to *B.* at a day certain, and died, leaving his younger son *John* his heir. After the day of payment was elapsed, the creditor sued out a writ to the sheriff of *Kent*, to extend and deliver to him all the lands which *John Abel* the father had on the day of acknowledging the statute. The sheriff returns, that he had delivered to other creditors upon recognizances, all the lands which *John Abel* had in fee, except the manor of *Fortysgray*, in which he had only an estate for term of life. Upon this return it was argued, that *John* the father had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase, and not by descent; but the court held the contrary, for which this reason (among others) is given by *Stonor, J. viz.* Because otherwise the fee and the right, after the death of *Walter* the eldest son, would have been in nobody. And therefore *Beresford, C. J.* gave the rule, that execution should be awarded upon this manor of *Fortysgray*.

§ 7. The

§ 7. The case from which this rule took its name, and in which it was finally established, was thus :

Edward Shelley being tenant in tail, suffered a recovery and declared the uses to himself for life, without impeachment of waste, remainder to a trustee for twenty-four years, remainder to the heirs male of the body of the said *Edward Shelley*, and the heirs male of such heirs male, remainder over. It was adjudged upon great consideration, that the words giving the remainder to the heirs male of the body of *Edward Shelley*, operated as words of limitation, and not as words of purchase, and therefore that *Edward Shelley* took an estate tail under the declaration of uses.

Shelley's Case,
1 Rep. 93.

§ 8. Serjeant *Roll* has attempted a distinction respecting this rule, by saying, that where the freehold is so limited to the ancestor, and a mediate remainder to his right heirs, that all the intermediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is in abeyance, because he can have no heir to take the remainder. But Mr. *Fearne* has controverted this distinction, and shewn that the possibility of the freehold's determining in the lifetime of the ancestor who takes it, does not prevent the subsequent limitation to his heirs from attaching in himself.

2 Roll. Ab.
418.

Cont. Rem.
32.

§ 9. When the ancestor takes only an estate for years (another person being the grantor) a remainder

1 Inst. 319 b.

to his heirs or to the heirs of his body will not vest in himself, but in such heirs, by purchase.

Sir C. Tipping's Case
cited,
1 P. Wms.
359.

§ 10. Thus, where, upon a marriage, a settlement was made by a third person, to the use of the husband for ninety-nine years, remainder to trustees during the life of the husband to support contingent remainders, remainder to the wife for life, remainder to the first and other sons of the marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband. It was admitted that the remainder in fee to the husband was contingent, because he only took the particular estate for years, and the estate did not move from him, for if it had, the remainder limited to his right heirs, would have been the old reversion.

Ante ch. 23.
§ 12.

Mode in
which mediate
Limitations
are vested.

§ 11. Where the subsequent limitation is immediate, it then becomes executed in the ancestor, forming by its union with his particular freehold one estate of inheritance in possession. But where such limitation is mediate, it is then a remainder vested in the ancestor, who takes the freehold, not to be executed in possession, until the determination of the preceding mean estates.

§ 12. Where the limitations intervening between the first estate for life, and the limitation to the heirs of the body are contingent, the estate for life is not merged, because the intervening limitations would be thereby destroyed; but the two limitations are united and executed in the ancestor only, until such time as

the intervening limitations become vested, and then they open and become separate, in order to admit such intervening limitations, when they arise.

§ 13. *Thomas Bowles*, in consideration of a marriage, covenanted to stand seised to the use of himself and his wife *Ann*, for the term of their lives; and, after their deceases, “to the use of their first issue male, and to the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue male, &c. And for want of such issue to the heirs male of the body of the said *Thomas* and *Ann*.”—It was resolved, that, until issue, *Thomas Bowles* and *Ann* were seised of an estate tail executed *sub modo*, that is, until the birth of issue male; and then, by operation of law, the estates were divided: and *Thomas* and *Ann* became tenants for their lives, remainder to the issue male in tail, remainder to the heirs of *Thomas*; as the estate, limited to them for their lives, was not merged.

Bowles's Case,
11 Rep. 79.

Vide *Meredith v. Leslie*.
Tit. 36.

§ 14. Mr. *Fearne* says, where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee simple to them, as an estate to *A.* and *B.* for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is both joint, it seems the fee vests in them jointly. And so if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them; as they are capable of issue to whom such joint inheritance can descend.

Of joint and several Limitations.

§ 15. If

§ 15. If the limitation of the freehold be not joint but successive, as to one for life, remainder to the other for life, remainder to the heirs of their bodies, there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail.

Stephens v.
Bretridge,
T. Ray. 36.

§ 16. Sir *Francis Wortly*, in consideration of an intended marriage with *Hester*, covenanted to stand seised to the use of himself for life, remainder to *Hester* for life, remainder to the heirs males which he should beget upon the body of *Hester*. It was resolved, that the estate tail was not executed, because there was an intervening remainder limited to the wife.

2 Term Rep.
435.
2 Blackst.
Rep. 731.
Ferne Cont.
Rem. 44.

§ 17. Where an estate for life is limited to *A.* with a remainder to heirs of *A.* and *B.* this is a contingent remainder, and not a vested estate. So if there be a limitation to the wife for life, remainder to the heirs of the body of the husband and wife, this is no remainder to the wife, for the freehold is limited to her alone, and as the person who is to take in remainder must be heir of both their bodies, if the wife should die before the husband, there can be no one to answer that description when the particular estate determines, because the husband cannot have an heir during his life, nor could it be involved or flow into the limitation to the wife herself, as not being confined to her own heirs; therefore the remainder is in contingency.

§ 18. If

§ 18. If the limitation of the inheritance be to several men, or to several women in tail, instead of fee simple, though the freehold be to them jointly, they take several estates of inheritance, because they cannot have issue between or among them as a man and a woman may. And the same rule extends to other cases, where the relative situations of the grantees renders the possibility of issue between or among them more remote than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage.

Fearne Cont.
Rem. 41.
Lit. f. 283.
1 Inst. 182 a.

§ 19. Where the particular estate is granted to two persons, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited.

§ 20. In a modern case, lands were conveyed by lease and release, in consideration of marriage, to *John Watkins* for life, remainder to *Susannah Stephens* his intended wife for life, for her jointure, remainder to the use of the heirs of the body of the said *Susannah* by him the said *John Watkins* to be begotten, and of their heirs and assigns for ever. It was held that *Susannah Stephens* took an estate tail.

Alpals v.
Watkins,
8 Term R.
516.

§ 21. Mr. *Fearne* observes, that limitations of this kind are said to be executed *sub modo*, that is, to some purposes, though not to all; for though they are so far executed in, or blended with the possession, as not to be grantable away from, or without the freehold by way of remainder, yet they are not so executed in
possession

possession as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower.

Both the
Estates must
be created by
the same
Instrument.

§ 22. The rule established in *Shelley's* case does not take place, unless the particular estate, and the remainder to the heir or heirs of the body, are created by the same conveyance: for, by the very words of the rule, as stated in *Shelley's* case, both estates must be created in the *same gift or conveyance*.

Cranmer's
Case,
2 Leon. 5. 7.

§ 23. It was determined so long ago as 16 *Elix.*, that if a lease was made to *A.* for life; remainder to the right heirs of *B.*, and *B.* purchased the estate of *A.* the remainder would not thereby become executed: for it was not conveyed by the original grant, but by the act of another person, after the original grant.

Moor v.
Parker,
1 Ld. Raym.
37.

§ 24. *A.*, on the marriage of *B.* his son, settled lands to the use of *B.* for life, remainder to the wife of *B.* for life, remainder to their first and other sons in tail, with reversion to himself in fee.

Afterwards *A.* devised the same lands to such issue male as *B.* should have by any other wife in tail male, and, in case of failure of issue male in *B.*, to his grandchildren by his daughter *C.* in fee. *B.* suffered a recovery, and died without issue male. *Holt*, Chief Justice, held clearly, that the devise to *B.*'s issue male, by any other wife, could not be tacked to the estate for life; because that was limited by another conveyance.

§ 25. Lord Keeper *Wright* is reported to have said 2 Vern. 486. respecting this point, that, “all the authorities are
“only in the affirmative; that if by the same deed
“they shall consolidate; not negatively, that if by
“different deeds, they shall not.” But there was no decree in that case; and this doctrine is now fully settled, by the following determination of the Court of King’s Bench :

§ 26. *Claude Fonnereau*, by indenture made between him and his eldest son *Thomas*, in consideration of natural love and affection, granted the estate to the said *Thomas* for life. Afterwards the father devised the reversion to the heirs male of the body of *Thomas*. It was contended, that the rule in *Shelley’s* case applied only, where both the limitations were in the same instrument; that the court now (when the feudal reasons, for which it was introduced, had ceased) would not be inclined to extend the rule, as it tended in most instances rather to defeat, than to give effect to, the real intention of the testator. Doe v. Fonnereau, Doug. 487.

Lord *Mansfield* said, the court was unanimous in thinking, that the estate for life being by one instrument, and the limitation in tail by another, they could not unite, Id. 510.

§ 27. By a settlement made after marriage, and a fine, lands were limited to *S. Morris* for life, remainder to *Hannah Morris* for life, remainder to the first and other sons of the marriage in tail, remainder to the first and other daughters in tail, remainder to *Hannah* Venables v. Morris, 7 Term Rep. 342.

Hannah Morris in tail, remainder to the use of such person or persons as *Hannah Morris* should by deed appoint. *Hannah Morris* appointed the estate to the use of the right heirs of *S. Morris* for ever.

Vide *Fearne*
Cont. Rem.
99.

Upon this case, sent out of Chancery for the opinion of the Court of King's Bench, it was certified that the appointment made by *H. Morris*, did not create any estate which could unite with the life estate of *S. Morris*.

It is the same
where the
Ancestor
takes by Im-
plication.

§ 28. It is immaterial, with respect to this rule, whether the ancestor takes the freehold by an express limitation, or by an implication arising from the deed in which the estate is limited to his heirs, or the heirs of his body. In either case the rule is applied and the subsequent limitation vests in himself.

Tit. 11. ch. 4.
l. 29.

§ 29. Thus, in the case of *Pybus v. Mitford*, it was determined, that the covenantor took an estate for his own life, by implication, and that the subsequent limitation to his heirs male was executed in him, and united to the estate for life, which he took by implication, so that he became tenant in tail.

The Rule not
extended to
the Words
Son, &c.

§ 30. As one of the principal reasons for establishing this rule was, to prevent an abeyance or suspension of the inheritance, it is only applied to limitations in which the word heirs is used, on account of the peculiar signification which the law has annexed to that word, and the maxim that *nemo est hæres viventis*; so that if lands are limited to *A.* for life, remainder to
his

his first and other sons and the heirs of their bodies; or remainder to the child and children of *A.*, or to the issue of *A.* and the heirs of their bodies; no more than an estate for life will vest in *A.*, and the words son, child, or issue, will operate as words of purchase.

Bowles's
Case, ante
f. .
Waker v.
Snow, infra.

§ 31. The word heir, in the singular number, with words of limitation superadded, is a word of purchase in a deed, for it operates as a description of the person intended to take.

Nor to the
Word Heir
in the singular
Number.

§ 32. *A.* conveyed lands by fine to the use of himself for life, remainder to the use of his first son and the heirs male of his body, with similar limitations to his 2d, 3d, 4th, 5th, and 6th sons, with remainder to the right heir male of the said *A.* to be begotten after the said sixth son and of his heirs male. It was held to be a contingent remainder.

Waker v.
Snow,
Palm. 359.

§ 33. Where the particular estate and the remainder to the heirs, or heirs of the body of the person to whom the particular estate is limited, are of different natures, as if the first limitation only gives a trust estate of freehold, and the subsequent limitation to the heirs of the body carries the legal estate, the words, heirs of the body, will operate as words of purchase, and will pass a contingent remainder to such heirs.

Nor where
the Estates
are of differ-
ent Natures.

§ 34. Thus, in the case of Lord Say and Sele v. Jones, where a trust estate was devised to a woman for life, and a legal remainder to the heirs of her body, it

Tit. 12. ch. 1.
f. 22.
3 Bro. Parl.
Ca. 113.

was held, that the heirs of her body must take by purchase, there being no instance where the legal limitation of an estate to the heirs of the body of any person had been united to a prior equitable limitation of the surplus profits of such estate to the same person for life, so as to make such person tenant in tail by construction of law.

Nor to Cases
of Marriage
Articles.

§ 35. This rule is not adopted in the construction of articles entered into before marriage for the purpose of making a settlement. For, in such cases, the Court of Chancery considers, that marriage articles are, in their nature, executory, and ought to be construed according to the intention of the parties; that a provision for the issue of the marriage, is one of the great and immediate objects of such agreement; and, consequently, that the intention of the parties, however untechnically expressed, must be, to make such a settlement as shall contain an effectual provision for that issue, who are purchasers for a valuable consideration; and whose rights it is the duty of a court of equity to protect: so that, where in marriage articles it is agreed to settle lands, to the use of the husband for life, with remainder to the heirs of his body, these last words are construed to be words of purchase, and to mean the first and other sons of the marriage, and the heirs of their bodies.

† Brown's
Rep. 222.

Trevor v.
Trevor,
2 P. W. 662.
1 Ab. Eq. 387.
Vide Cusack
v. Cusack,
1 Bro. Parl.
Ca. 470.

§ 36. Sir John Trevor, in consideration of an intended marriage, covenanted with trustees, before the end of two years, to settle and assure upon the said trustees and their heirs, certain lands, to the use of himself

self for life, without impeachment of waste ; remainder to the use of his intended wife for life ; remainder to the use of the heirs males of his body on her body lawfully to be begotten, and the heirs males of such heirs males lawfully issuing ; remainder to the use of his own right heirs. The marriage took effect ; but no settlement was ever made pursuant to these articles. Sir *John Trevor*, apprehending that he had an estate tail vested in him under these articles, he and his wife levied a fine of the lands. Upon the death of Sir *John Trevor*, his eldest son filed his bill in Chancery for a specific performance of these articles ; insisting, that it was not in his father's power to bar the limitation to him.

It was decreed, that Sir *John Trevor* took only an estate for life under these articles ; and that the remainder to the heirs males of his body, &c. gave an estate tail by purchase to the first and other sons of the marriage. And this decree was affirmed in the House of Lords.

§ 37. Where a settlement was made previous to a marriage, in pursuance of articles, and the settlement, by adopting the very words of the articles in limiting an estate for life to the husband, with a subsequent limitation to the heirs of his body, &c. had given him an estate tail, the Court of Chancery rectified the mistake, by making the intended husband only tenant for life, with contingent remainders to the issue of the marriage.

West v.
Erisley.
2 P. W. 349.
3 Bro. Parl.
Ca. 327.
Collect. Jur.
v. 1. 463.
Honor v.
Honor,
1 P. W. 123.
S. P.

§ 38. By articles, in consideration of an intended marriage, it was agreed, that the husband should settle his estate to the use of himself for life, without impeachment of waste ; remainder to the intended wife for life, remainder to the heirs male of the husband by the said intended wife ; remainder to the heirs male of the husband by any other wife ; remainder to the heirs female of the husband.

A settlement was made prior to the marriage, expressed to be made *in pursuance and performance of the articles*, by which the lands were limited to the intended husband for life ; remainder to the wife for life for her jointure ; remainder to the first and other sons of the marriage in tail male ; remainder to the heirs of the body of the said husband by his then intended wife ; remainder over.

The marriage took effect ; and there was issue one daughter. The wife died : and the husband, having an estate tail under the limitation to the heirs of his body, suffered a recovery, and sold the estate. The daughter left issue two daughters ; who, after the death of the husband, brought their bill to have the benefit of the articles, insisting, that the estate was intended to have been limited in strict settlement ; so that the last remainder ought to have been to the daughters of the marriage in tail general.

The bill was dismissed : but, upon an appeal to the House of Lords, this decree was reversed ; and the lands, comprized in the articles, were directed to be conveyed to the granddaughters, and the heirs female of

of their bodies, as tenants in common, with cross-remainders to them in tail female.

§ 39. In this last case, the equity arose to the issue female, in whose favour the court declared, that the settlement should be altered. But, in a subsequent case, where there was an express provision made for daughters, a limitation to the heirs of the husband generally was not construed as equivalent to a remainder to daughters. But it is now settled, that the same equity arises in favour of females as males.

Powell v.
Price,
2 P. W. 536.

Hart v.
Middlehurst,
3 Atk. 371.

§ 40. The general doctrine, that, where articles and a settlement are made before marriage, and the settlement is made in pursuance of the articles, if the words "*heirs of the body*" are transcribed from the articles into the settlement, they will be altered in Chancery, is fully confirmed by the following case:

§ 41. By articles before marriage, an estate was agreed to be settled on the husband for life, *sans* waste, remainder to the heirs male of his body, with power to raise portions for younger children,

Roberts v.
Kingsey,
1 Vef. 238.

A settlement was afterwards made before the marriage, in pursuance of the articles, which adopted the very words of the articles. After the marriage, the husband levied a fine of the estate, and declared the uses to himself in fee. The son of the marriage brought his bill to have the settlement rectified according to the intention of the articles, which was to make his father tenant for life only; though the words, both of the articles and settlement, in construction of law, made

him tenant in tail: for, if such was the intent, ~~it was~~ needless to give him a power to raise portions.

Lord *Hardwicke* decreed the lands should be conveyed to the son in tail.

§ 42. If the settlement is made after the marriage, and adopts the words of the articles, it will be rectified in the same manner as in the former cases.

Streatfield v. Streatfield, Forrest. Rep. 176.

§ 43. A person, by articles previous to his marriage, agreed to settle lands, to the use of himself and his intended wife for their lives, and the life of the survivor; and, after the survivor's decease, to the use of the heirs of the body of the intended husband on his wife begotten, with remainders over. The marriage took effect; and, several years after, the husband, by deed reciting the articles, settled certain lands to the use of himself and his wife for their lives, and the life of the longest liver of them; and, after their decease, to the use of the heirs of the body of the husband by his said wife, remainder to the right heirs of the husband.

It was decreed by Lord *Talbot*, that the husband ought only to be tenant for life, and the settlement must be rectified in that respect.

§ 44. This doctrine is adopted only in cases of marriage articles, and is not extended to limitations, in settlements of the legal estate.

§ 45. *John Watkins*, by settlement on the marriage of his eldest son, conveyed his estate to trustees to the use of himself for life, remainder to his wife for life; remainder to his son *John* for life; remainder to his intended wife for life, for her jointure; remainder to the heirs of the body of the said intended wife by the said *John* the son to be begotten, and their heirs and assigns for ever; remainder to the right heirs of *John* the son for ever.

Alpals v. Watkins,
8 Term R.,
516.

It was contended, that, as it appeared by a recital in the settlement, that it was made “for the settling, conveying, and assuring of the said premises to the several uses therein-after expressed,” a court of equity would rectify the settlement, by inserting a limitation to the first and other sons of the marriage, in the room of the limitation to the heirs of the body of the intended wife. But Lord *Kenyon* was clearly of opinion, that the wife took an estate tail under the settlement.

§ 46. Although, where articles are entered into before marriage, and a settlement is made after marriage, different from those articles, the court will set up those articles against the settlement; yet, when both the articles and the settlement are previous to the marriage, at a time when all the parties are at liberty, and the settlement is not expressed to be made pursuant to the articles, if such settlement differ from the articles, it will be considered as founded on a new agreement, and will control the articles.

Legg v. Goldwire.
Cases Temp.
Talbot. 20.

The Rule
adopted in
Assignments
of Terms for
Years

§ 47. The rule, in *Shelley's* case, has been adopted in the construction of assignments of terms for years; and the words, heirs of the body, have been held to be words of limitation.

Peacock v.
Spooner,
2 Vern. 43.
195. 1 P. W.
133.

§ 48. A term for years was assigned in trust that baron and feme might receive the profits during their lives, and the life of the longer liver of them, and, after their death, to the heirs of the body of the wife to be begotten by the husband; the court held, that the whole interest of the term vested in the wife. But this decree was reversed, and the reversal affirmed by the House of Lords; but the doctrine established by this reversal was soon altered.

Webb v.
Webb,
1 P. W. 132.

§ 49. A term of years was assigned, in consideration of marriage, to trustees, upon trust to permit the husband to enjoy the same as long as he should live, and, after his decease, to his wife, as long as she should live; and after their decease, to permit the heirs of the bodies of the said husband and wife to be begotten, to hold the premises during the remainder of the term; it was held by the Master of the Rolls, that the children of the marriage took by purchase. But, upon a rehearing before Lord Keeper *Harcourt*, his Lordship observed, he never heard it said before the case of *Peacock v. Spooner*, that the limitation of a term in equity differed from the case of a freehold at common law; and, as that case was not exactly parallel, he did not think himself tied up by it, and reversed the decree made at the rolls.

Haytor v.
Rod, Tit. 8.
ch. 2. f. 20.
2 Vef. R. 660.

§ 50. A term was vested in trustees by a voluntary deed, in trust to pay the profits to *Sarah Sharp* during her life, and, immediately from and after her decease, to the heirs of the body of *Sarah* lawfully to be begotten, if the term should so long endure; and, for default of such issue, to the granddaughter of the settlor.

Theobridge
v. Kilburne,
2 Ves. 233.

Lord *Hardwicke* was of opinion, that the whole trust of the term vested in *Sarah Sharp*.

§ 51. But where there were words of limitation superadded to the words heirs of the body, the construction has been different.

Unless there
are superad-
ded Words.

§ 52. *Edward Bussey* being possessed of a term for fifty-nine years, by voluntary deed conveyed it to trustees in trust, to permit *Grace Bussey* his wife to receive the rents and profits for the said term of fifty-nine years, if she should so long live, and after her decease to the use of the said *Edward* for life, and after the decease of *Edward* and *Grace*, then in trust for the heirs of the body of the said *Grace* by the said *Edward*, and to their executors, administrators, and assigns, for the residue of the said term of fifty-nine years, and for want of such issue, &c.

Hodsol v.
Bussey,
Forrest MSS.
S. C. 2 Atk.
89.
Barnard. 199.

Lord *Hardwicke* was of opinion that the whole did not vest in *Grace*, the words being, not words of limitation but of purchase; and that they might, from the circumstances of the case, be considered as words of purchase, appeared from *Archer's* case, where the superadding

1 Resp. 66.

superadding words of limitation made the word
 “heir” a word of purchase.

Price v. Price,
 2 Vef. 234.

§ 53. Where a person on his marriage settled a leasehold estate to trustees, to the sole and separate use of his intended wife for life, for her jointure, and from and after her decease, to the use of the heirs of the body of the wife, by the husband to be begotten, and for want of such issue, to the use of the husband and his heirs for ever. Sir *Joseph Jekyll* held, that on the wife's death, the leasehold vested in the heirs of her body, as purchasers.

Sands v.
 Dixwell,
 2 Vef. 652.

TITLE XXXII.

D E E D.

CHAP. XXVI.

The same Subject continued.—Of Perpetuities.

- | | |
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| <p>§ 1. <i>Perpetuities discouraged.</i>
 7. <i>History of Settlements.</i>
 11. <i>Estates may be rendered unalienable for Lives in being and 21 Years after.</i>
 13. <i>This Rule is applied to springing and shifting Uses.</i>
 16. <i>And also to Uses arising from Appointments.</i>
 18. <i>But not to Remainders after Estates Tail.</i></p> | <p>21. <i>An unborn Person may be made Tenant for Life.</i>
 23. <i>And a vested Remainder limited on that Estate</i>
 24. <i>But no Estate can be limited to the Issue of an unborn Person.</i>
 27. <i>These Rules applicable to Declarations of Trusts of Terms for Years.</i>
 29. <i>Perpetuities created by Act of Parliament.</i></p> |
|---|--|

Section 1.

WE have seen that by the introduction of the feudal law into *England*, all real property was rendered unalienable, and that by degrees the proprietors of land acquired a power of alienation. And this power was found to be so beneficial to the country, that the Judges have for many centuries established it as a rule, that real property should in no case be rendered unalienable, or as they usually expressed it, that perpetuities should not be allowed. And this rule being founded on principles of general policy, is adopted by courts of equity in as full an extent, as by courts of law.

Perpetuities discouraged.
 Ante ch. 1.

3 Cha. Ca. 31.
 1 Vern. 164.

§ 2. Thus,

Tit. 1. l. 60.

§ 2. Thus, it has been stated, that an unlimited power of alienation is an incident so inseparably annexed to an estate in fee simple, that it cannot be restrained by any proviso or condition whatever.

Dyer 23 a.

pl. 12.

3 Cha. Ca. 19.

§ 3. It was determined in the reign of Henry 8. for the same reason, that no remainder could be limited over after a previous disposition of the fee simple : for if such remainder was allowed, the estate in fee would become unalienable.

Tit. 2. ch. 1.

§ 4. The statute *De Donis Conditionalibus*, was procured by the nobility, for the purpose of rendering their possessions unalienable. But the Judges, by means of those fictitious proceedings, called fines and recoveries, of which an account will be given hereafter, effectually defeated the operation of this statute, and also laid it down as a rule, that a tenant in tail cannot be restrained from barring his estate in this manner, by any proviso or condition whatever.

Tit. 2. ch. 2.

l. 44.

Vide Tit. 35, 36.

§ 5. Any other mode of restraining a tenant in tail from alienation, will also be deemed void, as tending to a perpetuity.

Mainwaring
v. Baxter,
5 Vef. Jun.
458.

§ 6. Lands were limited by deed to A. for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to trustees for a term of one thousand years, remainder to the first and other sons of A. in tail male.

With

With a proviso that the trustees should, after any contract or agreement made by any of the persons taking estates under the deed touching the alienation of the premises, but before any alienation should be made, or any act done which might prevent the premises from going according to the limitations aforesaid, by sale or mortgage, raise 5000 l. and pay the same to the persons who would be entitled to the premises, in case the person contracting to alien were actually dead.

The Master of the Rolls said, it was a mere device to prevent alienation, and therefore he declared that the trusts of the term, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates tail were limited by the deed, were void, and of no effect.

§ 7. Mr. Butler has observed, that the first attempt at a settlement was, the creation of an estate in fee simple conditional. This had two effects, that of suspending the absolute power of alienation, till the birth of issue, and that of preserving the inheritance in a particular line of succession. When these estates were converted into estates tail by the statute *De Donis*, a simple intail of the land was sufficient to preserve it in the family of the settlor. Upon the introduction of fines and recoveries, settlements of this kind were found to be ineffectual. But when husbands seized in right of their wives, and women, seized of the gift of their husbands, were prohibited from alienating those estates, it became usual to limit the husband's estate

History of
Settlements.
1 Inst. 290 b.
a. 1. f. 3.

Vide Tit. 36.

estate to the husband and wife, and the heirs of the body of the wife, by the husband, and to limit the wife's estate to the husband and wife, and the heirs of the husband by the wife; by which means the estate was secured to the parents during their lives, and to the issue, against the act of either parent. Nothing but the concurrent act of both parties could deprive the issue of the estate. It was protected against the caprice or extravagance of one of the parties, so long as the other refused to co-operate in unfettering the intail, while there was a provision for unforeseen events, by their co-operation during their joint lives. And during the life of the surviving parent, the same effects might be produced, by the co-operation of that parent and the issue; and after the decease of both parents, the estate was restored to the issue with a complete power of alienation.

§ 8. The last mode of making settlements, and which still continues to be practised, was to limit the estate to the intended husband for life, remainder to the intended wife for life, remainder to the first and other sons of the marriage, successively in tail; by which means the estate was rendered unalienable until the eldest son of the marriage attained the age of twenty-one years, when he could join with his father or mother in suffering a common recovery; by which the estate tail limited to such eldest son, and all the subsequent estates, were barred; and a new fee simple acquired.

§ 9. There

§ 9. There was one inconvenience attending limitations of this kind, namely, that the tenant for life might bar and destroy the remainders limited to his first and other sons by the alienation or forfeiture of his estate; but the invention of trustees to preserve contingent remainders, of which an account has been already given, proved an effectual remedy to this abuse.

*Tit. 16. ch. 7.
l. 1. 2. 24.*

§ 10. Another mode of protracting the power of alienation was invented long after, by limiting the estate to the father for ninety-nine years, if he should so long live, and vesting the freehold in trustees during his life, upon which there was a limitation to the first and other sons (then unborn) of the father, successively in tail; by which means the power of barring the entail was in general protracted, until the death of the father.

*Tit. 16. ch. 7.
l. 20.
3 Atk. 136,*

§ 11. In consequence of the general admission of these modes of settling estates, it became fully established that real property might be rendered unalienable during a life in being and twenty-one years after. From one life the courts gradually proceeded to several lives in being at the same time, for this in fact only amounts to the life of the survivor; and as it may happen that a tenant for life, to whose unborn son an estate tail is limited, may die leaving his wife enſient, an allowance has also been made for the time of gestation of a posthumous child.

*Estates may
be rendered
unalienable
for Lives in
being and 21
Years after.*

*3 P. Wms.
265.*

§ 12. It

Forrest. R.
228.
Vide Lade v.
Helford,
Tit. 38.

§ 12. It may, therefore, be now laid down as a certain rule of law, that an estate may be rendered unalienable during the existence of a life, or any number of lives in being, and nine months, and twenty-one years after; but all restraints on alienation which exceed this period, are void. And, in the case of deeds, the limitations are also void.

This Rule is
applied to
springing
and shifting
Uses.
Tit. 16. ch. 5.
l. 17, &c.
Lloyd v.
Carew,
Show. Parl.
Ca. 137.
1 Com. R. 20.

§ 13. We have seen, that in those conveyances which derive their effect from the statute of uses, springing and shifting uses might be created to arise upon or after a limitation in fee-simple, and, it having been determined, that neither a fine or recovery, or any other act of the first taker, should defeat such springing or shifting use, it became therefore necessary to ascertain the time when such use should become vested; for, otherwise, springing and shifting uses might be limited on such remote contingencies, as to create perpetuities. It is, therefore, now fully established, that if an estate in fee-simple is first limited, the event on which the springing or shifting use is to arise must be such, that it must either take place, or become incapable of taking place, during the existence of one or more life or lives in being, and nine months and twenty-one years after.

§ 14. Thus, if there be a limitation of a use to *A.* and his heirs, with a proviso, limiting the estate to *B.*, if *A.* dies without issue living at the time of his death, or if *A.* and *B.* both die without issue living at the decease of the survivor of them, or, if *A.* has no child who attains the age of 21, or if neither *A.* nor *B.* have a child who attains the age of 21, it is a good pro-

viso ; for these events are such, that they must happen, or become incapable of happening within the period above mentioned. But, for the same reason, such a proviso would be bad, if limited to take effect after an indefinite failure of issue of C. a stranger, as that event might not happen till long after that period.

§ 15. Where husband and wife levied a fine of the wife's estate to the use of the heirs of the body of the husband on the wife begotten, remainder to the husband in fee, the limitation to the heirs of the body of the husband was held to be void as a contingent remainder, for want of a preceding estate of freehold to support it. And Mr. *Fearne* observes, there was no sort of ground to maintain the validity of the limitation to the right heirs of the husband, as a future use, as it was postponed to a general failure of heirs of the body of the husband, by the wife, which was too remote.

Davies v. Speed, Show. Parl. Ca. 104.

Cont. Rem. 429.

Holcraft's Case, Moo. 488. Fearne Ex. Dev. 111.

§ 16. With respect to contingent uses arising from the act of the parties, that is, by the execution of powers of revocation and appointment, it has been observed, that an appointment operates under the statute of uses, not as a conveyance of the land, but as a substitution of a new use in the place of a former one, and a designation of the person in whom the new use is to vest ; and the person taking under a power, derives his estate, not from the person executing the power, but under the original conveyance by which the power was created, in the same manner as if the use appointed had been originally limited to him in

And also to Uses arising from Appointments.

Ante ch. 16.

such conveyance; and that the use, when appointed by the person executing the power, is fed by the seisin of the trustees to uses in the same original conveyance. From these principles, it follows, that the uses created by an appointment under a power, must be such as would have been good, if limited in the original deed. And that, if such uses would have been void, if limited in the original deed, as too remote and tending to a perpetuity, they will also be void, if limited by an appointment under a power.

Spencer v.
Duke of
Marlborough,
3 Bro. Parl.
Ca. 232.

§ 17. *John Duke of Marlborough* devised all his estates to trustees and their heirs, to the use of his daughter *Harriet Countess of Godolphin* for life; remainder to Lord *Ryalton* her eldest son for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of Lord *Ryalton* in tail male; remainder to Lord *Robert Spencer* (eldest son of his second daughter *Ann Countess of Sunderland*) for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to *Charles Spencer* (afterwards Duke of *Marlborough*) in the same manner; and inserted a clause in his will, empowering his trustees, on the birth of each son of the said Lord *Ryalton*, Lord *Spencer*, and Lord *Charles Spencer*, to revoke and make void the respective uses limited to their respective sons in tail male, and, in lieu thereof, to limit the premises to the use of such sons for their lives, with immediate remainders to the respective sons of such sons, severally and respectively, in tail male: and he

gave

gave his household furniture, gold, plate, &c. in the same manner.

Upon an application to the Court of Chancery by the trustees, for further directions in the carrying the trusts of the will into execution, a question having arisen touching the power given in the will to revoke the uses limited to the first and other sons in tail, and to limit the premises to the use of such sons for life only; the Lord Chancellor declared, that the clause of revocation and settlement in the will, *as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect.*

On an appeal from this decree to the House of Lords, it was argued, on behalf of the appellants, that the same policy of the law, which will not permit estates to be fixed unalienably in one family for ever, will support and protect the means of preserving them till they come to that point, at which the mischiefs of a perpetual restraint may commence; the one being as necessary an incitement to industry as the other. This point, however, is difficult to fix. It has not yet been fixed by any legislative or judicial act or authority. It has, indeed, been determined, that estates may be made unalienable for the duration of any number of lives in being, and for 21 years beyond, and, in some instances, still farther: but no judicial determination has said what are the precise bounds, which shall in no instance, nor by any means, be exceeded. The particular mode of conveyance, though it may be new, or, according to the expression in the law-books, of the *tendency* of

the limitation to a perpetuity, is not sufficient to render such conveyance or limitation void. The interposition of trustees, to support contingent remainders, is an invention introduced about a century ago; an invention, which tended greatly to suspend and restrain the powers of alienation, and yet it is now become the established mode of settlement: every limitation of estates, and every restraint of alienation, has a proportionable tendency, in some sense, to a perpetuity. That if the means, made use of in this will, to make part of the Duke of Marlborough's estate accompany the honours and estates for one succession beyond the common limitations, were regular and according to the course of law, they seemed to introduce no danger of a perpetuity; since the restraint would not go beyond the sons of the several noble persons named in the will; and the immediate descendants of such sons would be tenants in tail, and have a power of alienation. That, if the trustees had executed this power upon the birth of the appellants, and the respondent the Duke, it was apprehended, that a court of equity would not have interposed to impeach it; and if, after an execution of the power, the limitations being to persons *in esse*, though for life only, would have been supported, the neglect of the trustees ought not, in equity, to prejudice the infant *cestui que* trusts; but, it being a power which the trustees were enjoined to execute, the court should consider it as executed from the respective times, when it ought to have been executed; that is, from the births of the several sons of the respective nominees.

On behalf of the respondent, the Duke of *Marlborough*, it was contended that, in the ordinary course of family settlements, nothing less than an estate tail is limited to persons not *in esse*. It has been hitherto understood to be the only method of carrying on successive remainders of inheritance, by way of strict settlement, in the families of successive tenants for life, consistently with the rules of law : for, if the grantor should, after the first vested estate of freehold, limit a contingent estate or use for life to a person unborn, and then follow it with contingent remainders in tail to the sons or children of such unborn tenant for life, such contingent limitations of the inheritance would be void. This arises from the policy of the law against perpetuities, that the vesting of the inheritance or ownership may not be suspended beyond the compass of a life or lives in being, or beyond the age of 21 of the first unborn tenant in tail, during whose infancy the law itself will restrain his power of alienation. That whoever has the vested estate in land, is the absolute owner, whether he is tenant in fee-simple or tenant in tail ; it being equally contrary to the rules of law, to prohibit either from exercising the powers of alienation incident to his estate. Conditions to restrain these powers generally are void, as being repugnant to the estate limited ; and it is admitted, that by the direct limitations in a deed, or devises in a will, the grantor or testator cannot limit an estate tail to a person unborn and the heirs of his body, and, immediately upon the event of his birth, direct it to cease as to such a tenant in tail, and continue as to his issue. If the law is undoubted, equity must follow it ; that the same

substantial rules of property may be followed by both jurisdictions. And, as the law will not allow the testator, by direct limitations, to turn a contingent remainder-man in tail into a tenant for life, at the very instant of time when the estate would vest, so, neither will equity allow him, by way of revocation, or, rather, by way of imperative trust, to enable trustees, as his instruments, to convert the tenant in tail after his birth into a tenant for life; which change the author of the trust himself could not effectuate, by any proper legal limitations originally inserted in his will. *Quodcunque prohibetur fieri ex directo, prohibetur et per obliquum.* That if the power given to the trustees, to revoke the uses upon the birth of the respondent, was allowed to be good, it would have been equally so, had it extended to all future generations, and made the estate for ever unalienable, which would be hardly contended. The testator most clearly intended a perpetuity, and openly avowed his design: with this view, he kept the different acts of parliament constantly before him, both in his will and in the deed of 1712; adopting the same form of expression, with the salvo, of *as far as may be by law*. And, being still conscious that the ingenuity of his lawyers, however skilful, could not keep pace with the legislative authority, he requested the sanction of parliament to the *settlement of his estates pursuant to his will, and according to his intentions expressed therein; so that the same might be unalienable as the honour and manor of Woodstock*.

Infra f. 31.

After hearing counsel on this appeal, the Judges were ordered to deliver their opinions to the House upon
the

the following question ; viz. “ Whether by the rules
 “ of law, an estate tail, limited to the use of persons
 “ unborn by any deed or will, can, by virtue of any
 “ power given by such deed or will to trustees, be re-
 “ voked upon the births of such persons, and a new
 “ estate be limited to such persons for their lives re-
 “ spectively, with remainder to the issue of such per-
 “ sons respectively in tail male?” And, the Lord
 Chief Justice of the Common Pleas having delivered
 the unanimous opinion of the Judges in the negative,
 it was thereupon ordered and adjudged, that the appeal
 should be dismissed, and the decree therein complained
 of be affirmed.

§ 18. It is, however, otherwise, with respect to
 contingent uses limited upon or after an estate tail;
 these may be given so as to take effect at any indefinite
 period of time, without regard to the rule above stated :
 because a recovery suffered by the tenant in tail, before
 the happening of the event on which the limitation is
 to arise, will destroy such limitation.

But not to
 Remainders
 after Estates
 Tail.

Vide Tit. 36.

§ 19. Thus, if an estate be limited to *A.* in tail, or
 to *A.* for life, remainder to *B.* in tail, or to the first
 and other sons of *A.* in tail, a similar limitation over
 to a stranger, to take place on *C.*’s dying without issue,
 would be good, because it may be barred by a re-
 covery.

Goodin v.
 Clark, 1 Lev.
 35.

§ 20. Such is the proviso frequently inserted in set-
 tlements, where, after a limitation of several uses in
 strict settlement, a clause is inserted for shifting the

1 Inst. 327 a.
 n. 2.

estate to a second branch of the family on the event of another estate ever coming to any of the persons to whom the settled estate is limited, which, by possibility, may not happen for many centuries, and then actually take place.

An unborn
Person may
be made Te-
nant for Life.

§ 21. It was formerly much doubted, whether a limitation for life to an unborn person was good; but it is now fully settled, that such a limitation is valid.

1 East. Rep.
452.

Ante §. 17.

In a modern case, Lord *Kenyon* said,—“ I remem-
ber hearing Lord *Mansfield* say, that when the case
of *Spencer v. Duke of Marlborough* was to be argued
in the House of Lords, there was found to be a mis-
take in the printed reasons on the part of those who
opposed the execution of the power in the manner
intended; for, it had been stated, that there could
not be a limitation to an unborn child for life, but
that was found to be wrong; for, certainly, there
may be such a limitation: they therefore cancelled
that reason, and framed another, stating the propo-
sition to be, that there could not be a limitation to
an unborn child for life, with limitations to the issue
of such unborn child in succession; and that doc-
trine was distinctly laid down by the learned Judge
who delivered the opinion of the Judges in the
House of Lords.”

Hay v. Co-
ventry,
3 Term R.
83. Fearn
Ex. Dev.
326.
Cases & Op.
vol. 2. 434.

§ 22. This doctrine has been fully confirmed in two modern cases; in one of which, Lord *Kenyon* said,
“ The law is now clearly settled, that an estate for
“ life may be limited to unborn issue, provided the de-
“ visor

“visor does not go farther, and give an estate in suc-
“cession to the children of such unborn issue.”

§ 23. It is now also settled, that a vested remainder may be limited upon an estate for life to an unborn person; and the late Master of the Rolls (Lord *Alvanley*) has said,—“A question might arise, how far
“an unborn child is to be made tenant for life, but
“it is established on good principles in precedent, cer-
“tainly that this may be. The doubt was, whether
“this was not tying up the estate beyond lives in be-
“ing, and 21 years afterwards; but that is not so,
“where the absolute interest is disposed of and vested,
“though part is given for life. For that person, with
“the person having the absolute interest, may dispose
“of it; it is not unalienable.”

And a vested
Remainder
limited on
that Estate.

*Rutledge v.
Dorrell*, 2 Vef.
Jun. 357.

§ 24. But it is equally clear, from what has been stated in the preceding sections as laid down by Lord *Kenyon*, that an estate limited to the issue of an unborn person, as purchasers, would be void; for this would be a possibility upon a possibility, which the law will in no case permit; and would also render an estate so limited unalienable during a longer period than is allowed.

But no Estate
can be limit-
ed to the
Issue of an
unborn Per-
son.

§ 25. An estate may be limited by an appointment to a person for life, who was not born at the time when the deed by which the power was created was executed.

*Brudenell v.
Elwes, 1 East.
R. 442.*

§ 26. A power was given in a marriage settlement to the husband and wife, and the survivor, to appoint the estate to all or any of the children of the marriage. The wife appointed an estate to one of the daughters for life, remainder to the eldest son for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male, remainder to the daughter in fee.

Lord *Kenyon* said, the wife had no power to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter, with remainder for life to the son, she did well; beyond that, she exceeded her power in appointing to the issue of the daughter, and, therefore, the excess was void.

These Rules
applicable to
Declarations
of Trust of
Terms for
Years.

§ 27. The rules respecting perpetuities are as applicable to declarations of trust of terms for years, as to any other conveyances; but the cases on this subject being governed by the same principles as those by which executory devises of terms for years are regulated, will be stated under that head.

*Tit. 13. ch. 1.
f. 32.*

§ 28. It has been already stated, that tenants for life, and also tenants for years, may be restrained from alienating their estates by means of a condition or covenant.

Perpetuities
created by
Act of Par-
liament.
*Tit. 2. ch. 2.
f. 42.*

§ 29. Estates may be rendered unalienable by act of parliament, as in the case of estates tail granted by the

the Crown to individuals as a reward for services, where the remainder or reversion is vested in the Crown, which cannot be barred by fine or recovery.

Tit. 35. c. 13.
Tit. 36. c. 13.

§ 30. There are also several instances of particular estates which are rendered unalienable by act of parliament. Thus, by a private act, 3 Cha. 1., the castle, honour, manor, and lordship of *Arundel*, together with other estates, were limited to *Thomas Earl of Arundel and Surrey*, and the heirs male of his body; remainder to the heirs of the body of the said Earl; remainder to Lord *William Howard*, and the heirs male of his body; remainder to the heirs of the body of the said Lord *William Howard*; remainder to the said Earl of *Arundel* and his heirs. And it was further enacted, that neither the said *Thomas Earl of Arundel*, nor any the heirs male or other heirs of his body, nor any other person or persons his or their heirs male of his or their bodies issuing, to whom any estate of inheritance of or in the premises, or any part thereof, should thereafter come, descend, or accrue by force or means of the said act, should thereafter alien, give, grant, bargain, and sell, or otherwise convey away the same, or any part thereof, or any other thing do, which should or might be to the disherison of the heirs inheritable by force of the said act.

Mountjoy's
Case, 3 Rep.
36.

§ 31. By the statute 5 Ann, c. 3., it is enacted, that the Duke of *Marlborough* shall stand and be seised of the honour, manor, and park of *Woodstock*, for and during the term of his natural life; remainder to the heirs male of the body of the said Duke; remainder

to all his daughters, and the heirs male of their respective bodies, severally and successively, according to the priority of their birth, with a proviso, that neither the Duke or the heirs males of his body, nor any of his daughters or the heirs males of their bodies, should have any power, by fine or recovery, or any other act, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, &c. were thereby limited, from holding or enjoying the same, according to the limitations in the act mentioned.

TITLE XXXIII.

Private Acts of Parliament.

- | | |
|---|---|
| <p>§ 1. <i>Alienation by matter of Record.</i>
 2. <i>Private Act.</i>
 5. <i>What makes an Act private.</i>
 12. <i>Some Cases in which private Acts may be obtained.</i>
 23. <i>Mode of passing private Acts.</i>
 31. <i>Operation of a private Act.</i>
 34. <i>Will bar an Estate Tail and all Remainders over.</i></p> | <p>38. <i>But not a Remainder after an Estate for Life.</i>
 40. <i>Construction of private Acts.</i>
 43. <i>Effect of the general Saving.</i>
 49. <i>A Private Act may be relieved against.</i>
 54. <i>Standing Orders of the House of Lords.</i>
 55. <i>As to Bills relative to Estates in Ireland.</i></p> |
|---|---|

Section I.

HAVING explained the nature and operation of deeds entered into by private persons, which derive their effect from the consent of the contracting parties ; I shall now proceed to treat of those assurances which are effected by matter of record ; that is, where the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one person to another.

*Alienation
by matter of
Record.*

§ 2. The first of these is a private act of parliament, which derives its origin from the following circumstances.

Private Act.

It was a common practice, so early as in the reign of *Edw. 1.* for persons to present petitions to parliament for relief in private affairs. These were referred

*Hale's Jurisd.
of Lords, ch.
4. ch. 10.*

to

Id. ch. 12.

to certain prelates, earls, and barons, who were appointed, at the meeting of every parliament, to be receivers and tryers of petitions; who, upon examination of the contents of such petitions, indorsed upon them what course was to be pursued by the petitioners to obtain redress.

§ 3. In these cases, where the petitioners might have relief by the ordinary course of law in the King's Courts, the answer was, that the petitioners might sue at common law; and sometimes the petition was referred to the proper court, in which the case was determinable. But in those cases where the petitioner could have no relief without a new law, made by an act of parliament, either in that particular case, or which might by a general purview extend to it, the petition was referred to parliament, and an award was made upon it by the King and the Lords, or by the Lords alone, and sanctioned by the King, which had all the force and effect of a statute.

Rot. Parl.
Vol. 3. 427.
N^o 78, 79.

§ 4. In the first year of the reign of *Hen. 4.* the commons indirectly claimed a right of concurring with the Lords in the consideration of petitions, and of joining in the awards made upon them; but the Archbishop of *Canterbury* told them, in the King's name, that they were only petitioners, and that all judgments appertained to the King and to the Lords; unless it were in statutes, grants, subsidies, or such like, the which order the King would from that time be observed.

It became, however, fully established in the reign of *Richard 3.* that no award could be made on a private petition, without a formal and complete act of the whole legislature: and, therefore, from that period they have been called *private acts of parliament*, and are distinguished in the statute book from public ones.

§ 5. A private act of parliament is described by Lord Ch. Baron *Comyns*, to be a statute, which concerns only a particular species, or thing, or person. And in 39 *Eliz.* it was resolved by the Court of King's Bench, that the statute 21 *Hen. 8. c. 13.*, by which spiritual persons were abridged from having pluralities of livings, was a general act; because it concerned the whole spirituality in general: but it was admitted that the statute 18 *Eliz. c. 6.*, concerning colleges in the two universities, and the colleges of *Eton* and *Winchester*, was a private act. It was also observed that the statutes 13 *Eliz. c. 10.* and 18 *Eliz. c. 11.*, concerning colleges, deans, and chapters, hospitals, parson, vicar, or any other having any spiritual or ecclesiastical living, were general acts: and that the statute 1 *Eliz.*, concerning leases, &c. made by bishops, was a special private act, because it concerned the bishops only, who are but a species of the spirituality.

What makes
an Act private.
Dig. Tit.
Parl. (R. 7.)

Holland's
Case,
4 Rep. 76 a.

5 Rep. 2 a.

§ 6. It is said in the same case, that, if an act is special, that extends *ad species*, à multo fortiori it is special or particular, which extends *ad individua*. Now, although the matter be special, so that under it there are no *individua*, yet if it is general as to persons,

4 Rep. 76 b.

sons, it is a general act: but, if it concerns *aliquod singulare seu individuum*, although it be general as to persons, it will be deemed a private act. So, although the act as to persons is general, but the matter thereof concerns *individua* or singular things, as a particular manor-house, house, &c. or all the manors, houses, &c. which are in one or sundry particular towns, or in one or divers particular countries, it is a private act.

4 Rep. 77 a.

§ 7. It is also laid down by the court in *Holland's* case, that every act, although the matter thereof concerns *individua* or singular things, yet if it touches the King, is a public act: for every subject has an interest in the King, as the head of the commonwealth. And it was resolved in the case of *Willion v. Berkeley*, that an act, which was made in 35 Hen. 8., by which all conveyances made by the Lady Catherine (Henry the 8th's Queen), or to her, by or to the King, should be valid, was a public act.

Plowd. 227.

10 Rep. 57 b.

§ 8. In a public act there may be a private clause, as in the statute 3 Jac. 1. the clause, which gives the benefices of recusants in particular counties to the universities, is a private act.

Samuel v.
Evans,
2 Term R.
569.

§ 9. The statute 23 Hen. 6. c. 9., respecting bailbonds, was for a long time considered as a private act; but, in a modern case, it was held to be a public one.

§ 10. A private

§ 10. A private act is not printed or published among the laws of the sessions; it remains, however, inrolled among the public records, and in general it must be specially set forth and pleaded, otherwise no judge or jury are bound to take notice of it. But it has lately been a practice to insert a clause in acts of a private nature, declaring that they shall be deemed public acts.

1 Inst. 98 b.
n. 1.

§ 11. In modern times a private act of parliament respecting real property, usually called an estate act, is a conveyance or settlement of lands or hereditaments, made under the immediate sanction of parliament, in cases where the parties are not capable of substantiating their agreements without the aid of the legislature; and where the carrying such agreements into effect is evidently beneficial to the parties.

§ 12. It would be utterly impossible to enumerate the variety of cases in which private acts of parliament may be obtained. A few of them shall however be mentioned.

Some Cases
in which pri-
vate Acts may
be obtained.

§ 13. Where a person is tenant for life, with remainder to his first and other sons in tail, under a will or settlement, and he either has no children, or has children under age; if an opportunity offers of selling the estate to great advantage, a private act may be obtained vesting such settled estate in trustees in fee, discharged from the uses of such will or settlement, upon trust to sell the same, and to lay out the money

in the purchase of other lands, to be settled to the same uses.

§ 14. Where a person, having an estate in strict settlement, has an opportunity of making an advantageous exchange with another person, or is desirous of exchanging his settled estate, for another estate whereof he is seised in fee: a private act may be obtained for vesting the settled estate in the person with whom such exchange is agreed to be made; or in the tenant for life himself, in fee-simple, and limiting the estate taken in exchange to the same uses, to which the settled estate stood limited.

§ 15. Where an estate, limited in strict settlement, is charged with the payment of a considerable sum of money, an act may be obtained for vesting the whole or a competent part thereof in trustees in fee, upon trust to sell the same and pay off the debt, and to lay out the surplus in the purchase of other lands to be settled to the old uses.

§ 16. Where a tenant for life has no power of making long leases, and it would be advantageous to the estate if it could be let for a long term of years; an act may be obtained for enabling the tenant for life to make long leases, under such reservations and restrictions as are necessary to render such leases beneficial to the estate, and to the persons in remainder and reversion.

§ 17. Where

§ 17. Where a tenant has expended his own money in making improvements which will be beneficial to the inheritance, or is desirous of making such improvements, an act may be obtained enabling him to charge the estate with the money so laid out, or to be laid out, on such improvements.

§ 18. Where a bishop or other ecclesiastical person has an opportunity of exchanging lands, whereof he is seised in right of his bishopric, for other lands of greater value, a private act may be obtained for confirming such exchange.

§ 19. Where it is necessary that the estates of a lunatic should be sold for payment of debts and incumbrances, an act may be obtained for vesting such estates in trustees; upon trust to sell the same, and to apply the money in payment of the debts and incumbrances, under the direction of the Court of Chancery.

§ 20. Where an estate is vested in several persons, as co-parceners or tenants in common, some of whom are lunatics, or infants, or tenants for life, and a fair and just partition is made thereof; an act may be obtained for confirming such partition, by which the infants, lunatics, and remainder-men, will be bound: and each person, to whom a share is allotted, will acquire the legal estate therein.

§ 21. Where a male infant is desirous of marrying, with the approbation of his parents or guardians, an

Rot. Parl.
Vol. 6. p. 128.
Nº 24.

act may be obtained enabling him to make a proper settlement on such marriage, such settlement to be as valid as if he was of age. And there is an act in 14 *Edw. 4.* by which it was ordained, that *Henry Duke of Buckingham* should be taken, reputed, and adjudged, as a person of full age; and that all things, by him or against him to be done, should be of such force and effect as if they were done at his full age.

§ 22. Where something has been omitted in a deed, which is absolutely necessary to carry it into execution; or where there has been a palpable and evident mistake; an act may be obtained to supply such omission, or to rectify such mistake.

Mode of passing private Acts.

§ 23. Where a private act originates in the House of Lords, the mode of proceeding is thus:—A petition is presented to the House of Lords, signed by all the parties interested in the act; stating the facts, and praying leave to bring in a bill for the purpose therein mentioned. This must be presented by a peer: and an order of the house is made, referring the petition to two of the judges, who are authorized and directed to summon all persons concerned in the bill before them; and, after hearing them and perusing the bill, to report to the house the state of the case, and their opinions thereupon, under their hands, and to sign the bill.

§ 24. The petition is then presented to the two judges to whom it is referred, together with a draft of the bill: all the recitals in the bill are proved before them

them in the same manner as on a trial in ejectment. The judges then make their report, and certify, that the bill is proper for effectuating the purposes intended.

§ 25. The bill is brought into the house, read twice, and committed; the same proofs must be submitted to the committee, which were produced before the judges; and the chairman reports it to the house. It is then read a third time, and sent to the House of Commons, where it goes through the same forms, and is sent back to the House of Lords, to receive the royal assent; which is given by the words, "*Soit fait, come il est désiré.*"

§ 26. Where a private act of parliament originates in the House of Commons, a petition is presented, signed by the parties who are suitors for such bill; stating the facts, and praying leave to bring in a bill, which is presented to the house by a member. A motion is then made, that it be referred to a committee to examine the allegations in the petition. The evidence must be produced before this committee, and when concluded, the chairman makes his report, and moves for leave to bring in a bill pursuant to the petition. The bill is then brought in, read twice, and committed: all the evidence is again produced before the new committee, which the chairman reports to the house, and moves that the bill be engrossed. It is then read a third time, and sent to the House of Lords. There it is twice read, and then committed: the evidence is again produced before the committee

of the House of Lords ; the Lord in the chair reports the bill to the house ; it is read a third time, and then receives the royal assent.

§ 27. The consent of all parties in being, and capable of consenting, who have the remotest interest in the property affected by the bill, is expressly required
2 Comm. 345. to every private act ; unless (says Sir *William Blackstone*) such consent appears to be perversely, and without any reason, withheld.

§ 28. Where infants, or other persons incapable of acting for themselves, are to be bound by a private act of parliament, a full equivalent must be settled upon them, in lieu of what is taken by the act : and, in general, the legislature will not suffer the property of infants, or other persons incapable of acting for themselves, to be altered by a private act ; unless it appears that they will be benefited by such alteration.

§ 29. A general saving is now always added, at the close of every private act, of the rights and interests of all persons whomsoever ; except those whose consent is given or purchased, and all persons claiming under them, and who are therein particularly named.

§ 30. By a number of standing orders, made at different times by the Houses of Lords and Commons, which will be stated hereafter, every sort of precaution appears to have been adopted by the legislature, to prevent the possibility of surprise or fraud in obtaining private acts, and particularly as to estate bills ; which
must

must be referred to two judges, to report on the facts, and the propriety of the bill. But still there have been some cases, in which great imposition has been practised on parliament by false evidence.

Vide 34 Geo. 3. c. 66.

§ 31. With respect to the operation of a private act, it is as powerful and effective, if duly and properly obtained, as a public one, in binding all those who are intended to be bound by it, and whose rights are not saved. But it has always been held, that a private act does not bind strangers, even before the general practice of inserting a saving clause in every private act was adopted.

Operation of a private Act.

§ 32. Thus, in 21 Hen. 7. it was adjudged, in the case of the prior of *Castle-acre* and the dean of *St. Stephens*, that the act 1 Hen. 5. c. 7., which gave the lands of priors aliens to the King, did not extinguish an annuity of the prior of *Castle-acre*, which he had out of a rectory, parcel of a priory alien, though there was not any saving in the act.

8 Rep. 138 a.

§ 33. So, in a case in 8 Jac. where the question was, whether the act 22 Edw. 4. c. 7. which under certain circumstances authorizes the proprietors of grounds in forests, after a felling, to inclose them without the King's licence, for seven years, to preserve the springing wood, should be construed so as to exclude persons having right of common: upon this point Lord *Coke* reports one of the reasons, upon which the judges of the Common Pleas adjudged that the commoners were not bound by the statute. "It

Barrington's Case, 8 Rep. 136.

S. C. Godb.
R. 167.
Chalk and
Peter's Case.

Lucy v.
Livingston,
1 Vent. 176.

“ appears by the preamble, between what persons, and
 “ for and against what persons this act was made;
 “ and the parties to this great contract, by act of
 “ parliament are the subjects having woods, &c.
 “ within forests, chaces, and purlieus of the one part,
 “ and the King and the other owners of the forests,
 “ chaces, and purlieus of the other part; so that the
 “ commoners are not any of the parties between
 “ whom this act was made,” and cited the case
 of the prior of *Castle-acre*. — And, in a subse-
 quent case, Lord *Hale* said—“ Every man is so far
 “ party to a private act of parliament, as not to
 “ gainsay it, but not so as to give up his interest; ’tis
 “ the great question in *Barrington’s case*, 8 *Co.* The
 “ matter of the act there directs it to be between the
 “ foresters and the proprietors of the soil; and there-
 “ fore it shall not extend to the commoners, to take
 “ away their common. Suppose an act says, whereas
 “ there is a controversy concerning land between *A.*
 “ and *B.*, ’tis enacted that *A.* shall enjoy it; this
 “ does not bind others, though there be no saving,
 “ because it was only intended to end the difference
 “ between them two.”

Will bar an
Estate Tail,
and all Re-
mainders over.

§ 34. It was formerly the usual practice, where a
 tenant in tail applied for a private act of parliament,
 to bar his estate tail, and convert it into a fee simple,
 that the persons in remainder and reversion should
 give their consent to the act; but although such con-
 sent be not given, yet an estate tail, and all the
 remainders,

remainders, and the reversion depending on it, may be barred by a private act of parliament.

§ 35. This point is fully established in an opinion, given by the late Mr. *Booth* on the following case :

Cases and
Opinions,
8vo. vol. 2.
p. 400.

The Duke of *Kingston* being tenant for life under the will of *Evelyn Duke of Kingston*, with remainder to his first and other sons successively in tail male, remainder to *Granville Earl Gower* in tail male, with several remainders over. The Duke, having no son, agreed with Lord *Gower* for the purchase of his interest in the estates thus devised, in consideration of 21,000 *l.* And, in order to carry this agreement into execution, the Duke and Lord *Gower*, without the consent of any of the persons in remainder, applied for an act of parliament, stating the preceding facts; and stating that, although Lord *Gower* was enabled by law, with the concurrence of the Duke, to bar the remainder in tail vested in him, and all the remainders, and the reversion expectant thereon, yet, as the premises, agreed to be purchased by the Duke, were limited, after his death, to his first and other sons in tail male, they could not be vested in him in fee-simple, without the aid of an act of parliament.

Tit. 36.

A private act was accordingly obtained, by which it was enacted, that the estates in question should be vested in two persons and their heirs, freed from the uses declared in the late Duke's will, and should be to the use of the then Duke and his heirs: and divers other estates of equal or greater value were vested in
two

two persons, to the use of the Duke of *Kingston* for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to the Duke in fee; with a general saving of the rights of all persons, except the Duke and his heirs, and the first and other sons of his body and their heirs male, and Lord *Gower* and his heirs male, and all persons claiming any estate in the premises under the will of *Evelyn* Duke of *Kingston*.

The Duke of *Kingston* being desirous of selling one of the estates vested in him in fee under this act, a doubt was suggested, touching the effect of the act, with respect to the persons claiming under the late Duke's will in remainder, expectant on the determination of the estate tail vested in Lord *Gower*, how far their rights and interests were barred by the act, as well in the estate whereof the uses were discharged by the act, as in the estates settled by way of equivalent; the same being limited to the Duke in fee-simple upon failure of issue male of his own body, and not to the uses limited in the will.

Vide Standing Order of 19th April 1799 *infra*.

In answer to this objection, Mr. *Booth* gave his opinion, that, supposing the rules and orders of the House of Lords, with respect to summoning all persons concerned in interest to appear and consent, were not observed, this would not invalidate the act; for either house of parliament might dispense with their own orders, whenever they thought fit; but here was no grievance, no irregularity. The rights of the persons in remainder, after Lord *Gower*'s estate tail, were of

no

no value; since, by a common recovery duly suffered, those rights could be annihilated in the next term. As they were obliged to go to parliament, they were advised, and rightly advised, that to suffer four recoveries, (for the lands lay in four counties), would be to go to a needless expence: for that, in a case, where parliamentary assistance was, on other accounts, indispensably necessary, there, the parliament would so frame their words, which were to become a law, as to have the same force and operation, and to bar all rights that would be barred by a common recovery. *Frustra fit per plura, quod fieri potest per pauciora*, was a rule of equity, reason, and good sense.

§ 36. The doctrine, laid down by Mr. *Booth*, has been fully confirmed by a modern case, in which the Court of Chancery held, that a private act would bar an estate tail, and all remainders expectant thereon, and also the reversion, although the rights of the remainder-men were not excepted in the saving.

§ 37. *Robert Westby* being tenant for life under a settlement of an estate in *Lancashire*, with remainder in fee to four persons as heirs at law to the settlor, and being tenant in tail of another estate in *Yorkshire* with remainders over, under which the defendant *John Westby* claimed, and having occasion for money to pay debts, and one of the heirs at law being an infant, a private act of parliament was obtained in 1731, on the application of *Robert Westby* and the heirs at law; by which, a part of the *Lancashire* estate was vested in trustees to be sold for the payment of *Robert Westby's* debts;

Westby v. Kiernan,
Amb. R. 697.

4 Geo. 2. c. 29.

debts; and the *Yorkshire* estate was vested in trustees to the use of *Robert Westby* for life only, with limitations over as in the settlement; with a power for *Robert Westby*, in case of failure of issue male of his body, to charge the *Lancashire* estate with a sum of money. The saving clause, at the end of the act, saved the rights of all persons except those of *Robert Westby*, of the reversioners of the *Lancashire* estate, and of the heirs and issues of *Thomas Westby*, but no exception of the heirs or issues of — *Westby*, under whom the defendant *John Westby* claimed.

Robert Westby, by deed, in 1732, executed his power, and died without issue; having devised the money, charged by the execution of the power, to his executors upon several trusts.

Upon a bill filed by the executors to have the sums raised, which were charged by *Robert Westby*, a question arose, whether the power, given by the act of parliament to charge the *Yorkshire* estate, could take place against the defendant *John Westby*, who claimed under — *Westby*, the person entitled in remainder upon the death of *Robert Westby*, who died without issue.

Lord *Apsey*, after argument, was clear of opinion, that *Robert Westby* being tenant in tail of the *Yorkshire* estate, the right of those in remainder was, and was meant to be, barred by the act of parliament: and there was no occasion to except their rights, as was done in other cases, where the act passes upon the ap-
plication

plication of a tenant for life ; for *Robert Westby*, being tenant in tail, might have barred the remainder by a recovery : and, therefore, this case differed from that of the Duke of *Somerset*, who procured an act of parliament for the exchange of livings ; he was only tenant for life ; and, the right of those in remainder not being excepted out of the saving clause, they were not bound by the act. Infra. f. 39.

§ 38. But, where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life estate. But not a Remainder after an Estate for Life.

§ 39. Thus, in the case alluded to by Lord *Apsley*, in *Westby v. Kiernan*, it appeared, that *Charles Duke of Somerset*, having the honour of *Petworth*, was desirous of acquiring the rectory of *Petworth*, which belonged to *Eton* college ; and not having any benefice or advowson, whereby he could tempt the college to give him the rectory of *Petworth* in exchange, applied to and prevailed on the crown, to give to the college the advowson of *Worplesdon* ; and the Duke, in return, agreed to give the crown the rectory of *Overblowes* as an equivalent. Whereupon, it was agreed, that the advowson of *Worplesdon* should be vested in *Eton* college, the rectory of *Petworth* in the Duke, and the rectory of *Overblowes* in the crown, for ever. This agreement was confirmed by a private act of parliament in 4 & 5 *Wm.* and *Mary* ; whereby it was enacted, that Provost of Eton v. Ep. Winton, 3 Will. R. 483.
the

the advowson of *Overblowes* should be, and thereby was vested and settled in their Majesties and their successors, in right of their crown, for ever ; that the advowson of *Worpleston* should be settled and vested in the provost and college of *Eton* and their successors for ever ; and that the advowson of *Petworth* should be, and was thereby vested in the Duke and Duchess of *Somerset* and their heirs ; with a saving of the rights of all persons (other than their Majesties, &c. the Duke and Duchess and their heirs, and *Eton* college and their successors) to the said advowson, or any of them.

It was afterwards discovered, that, by a settlement made in 1687, (which was previous to this act), the rectory of *Overblowes* was settled to the use of the Duchess of *Somerset* for life, remainder to their son *Algernon* Earl of *Hertford* in tail male, remainder to their issue female ; and that, Lord *Hertford* having died without issue male, the rectory vested in his sister Lady *Catherine*, who married Sir *William Wyndham*, and died leaving *Charles*, afterwards Earl of *Egremont*, her eldest son, who died leaving *George* Earl of *Egremont* his eldest son. It was admitted on both sides, that, upon the death of the Duke of *Somerset*, the rectory of *Overblowes* vested in Lord *Egremont*, because he was within the general saving of the act.

Construction
of private
Acts.

§ 40. Private acts are construed in the same manner as conveyances that derive their effect from the common law ; and, therefore, when any doubt arises as to the construction of a private act, the court will consider what the object and intention of the parties was

was in obtaining the act, and will, if possible, give effect to that intention.

§ 41. In the case of the Provost of *Eton* v. the Bishop of *Winchester*, which has been already stated, the crown having lost the advowson of *Overblowes*, to which Lord *Egremont* became entitled under the settlement of 1687, by the death of *Algernon* Earl of *Hertford* without issue male, claimed from the college of *Eton* the advowson of *Worpleston*, and presented to it; upon the principle, that the whole transaction became void by the defect of title in the Duke of *Somerset* to the advowson of *Overblowes*; whereupon, the college of *Eton* brought a *quare impedit*. Ante f. 39.

It was contended, on the part of the crown, that private acts of parliament were to be construed like deeds; and that this act should be considered as an exchange, in which there was a mutual warranty; and that the eviction of the advowson of *Overblowes* by Lord *Egremont*, gave the crown a right to be restored to the advowson of *Worpleston*. But it was answered, on the part of the college of *Eton*, that the act could not be considered as an exchange; because an exchange could only be made between two parties: and, therefore, judgment was given for the college. Tit. 32. c. 8.
f. 5.

§ 42. A private act of parliament was passed in the year 1777, for inclosing and dividing the common and waste grounds within the manor of *Yealands*; by which it was enacted, that the commissioners should set out, allot, and assign unto the lady of the manor Townley v. Gibson,
2 Term. R.
701.

nor 20 statute acres of the common and waste grounds, in lieu of, and as a compensation for, her right and interest in and to the soil of the residue of the said common and waste grounds respectively. And then, that the commissioners should allot and assign the residue of the said common and waste grounds unto, for, and amongst the said lady of the manor, for and on account of her messuages, tenements, lands, and hereditaments within the said manor, in respect whereof she was entitled to right of common upon the same common and waste grounds, and to the several other persons having right of common, or other right, interest, property, or privilege thereon, and to their heirs and assigns for ever, according and in proportion to their several and respective rights, &c.

A subsequent clause directed, that “ all and every
 “ the allotments, &c. to be made under the act, should
 “ be vested *in fee-simple* in the several and respective
 “ persons, &c. to whom the same should be set out
 “ or allotted, and their heirs, assigns, and successors
 “ respectively for ever, absolutely freed and discharged
 “ of and from all customary tenures, rents, fines, boons,
 “ and services whatsoever ; and that the several shares
 “ or allotments so to be set out as aforesaid, should be
 “ in lieu of, and in full compensation and satisfaction
 “ for, all rights of common and other former property,
 “ privilege, right, &c. ; and that all rights of com-
 “ mon, together with all former rights, interests, pro-
 “ fits, &c. in and upon the same, should, from and
 “ immediately after that time, cease, and be for ever
 “ barred and extinguished ; provided always, and it
 “ was

“ was further enacted, that *nothing in that act contained*
 “ *should extend to prejudice, lessen, or defeat the right,*
 “ *title, or interest of the said lady of the said manor,*
 “ *her heirs or assigns, of, in, or to the seigniories incident*
 “ *or belonging to the said manor, but that she and they,*
 “ and every of them, should and might at all times
 “ thereafter hold and enjoy all *rents, fines, services,*
 “ courts, perquisites, and profits of courts, goods and
 “ chattels of felons and fugitives, felons of themselves,
 “ and put in exigent, deodands, waifs, estrays, for-
 “ feitures, and *all other royalties and manerial jurisdic-*
 “ *tions whatsoever, in and upon the said common and*
 “ waste grounds, thereby intended to be inclosed as
 “ afore said, to the said manor, or the lord or the lady
 “ thereof for the time being, incident, belonging, or
 “ appertaining, and the same in as full, ample, and
 “ beneficial a manner, to all intents and purposes, as
 “ she or they might or could have held or enjoyed the
 “ same, in case this act had not been made.”

Before the passing of this act, the lady of the manor was entitled to the mines and minerals lying under the soil of the manor, of which they had made several leases; the last of which was made to one *Tiffington* in 1757, to hold from the 25th of the ensuing *March* for 21 years, under which the mines were worked and continued to be so, till some time in the year 1759; but, from that period, the lessee discontinued the works, though the lease was subsisting at the time when the act was made.

The question was, whether the lady of the manor was entitled to the mines under the clause of reservation in the act, allotting the inclosures to the several tenants of the manor?

It was contended on behalf of the tenants of the manor, that the act barred the lady of the manor from claiming any future right to the mines and minerals in the manor: for, by the first clause, it appeared, that the commissioners were to set out 20 acres to the lady of the manor, in lieu of and as a compensation for her right and interest in the soil of the residue of the waste ground. And, on the other hand, that all allotments to the several tenants were to be in fee, which the act declared should be a full compensation for all rights of common and other former property, privilege, right, title, interest, claim, and demand whatever. That, if the act had stopped there, there could have been no doubt but that the lady of the manor would have had no right whatever to the mines in the allotments. But, if the clause of reservation entitled her to them, and a right still remained in her of digging in those inclosures, without making any allowance for the injury sustained by the owner of the soil, all the purposes of the act would be defeated. The latter clause only provided, that the lady of the manor should suffer no prejudice as to her right to all feignories incident to the manor; and that she should still enjoy all rents, fines, services, &c. and other royalties and manerial jurisdictions; but there was nothing in that clause which had the least reference to the soil of the manor; and the particular enumeration of the things intended was decisive, that

that mines were not intended to be reserved, otherwise they would have been mentioned. The word feignories, in the former part of the clause, was defined and explained by the words which followed, and could only mean things of the same nature as those mentioned.

On the other side, it was said, that this being a private act, passed at the requisition of the parties concerned, was to be construed like all other private agreements; and, consequently, the court would consider the probable intention of the parties to be collected from the situation and state of their several rights, at the time when the act passed. The ancestor of the defendant was the lady of the manor; and, as such, she would have been entitled, not only to the mines under the wastes, but also under the copyhold inclosures, unless there had been some custom to exclude her. The right of these mines existed in the lady of the manor, separate from the interest in the soil, as appeared from the leases of the mines, during the continuance of the last of which the act passed. It was admitted, that the words in the first clause were large enough to comprehend mines, if such had been the intention of the parties; but that could not have been so intended; for then the subsisting lease would have been affected, and the rents thereby reserved, which certainly could not have been intended; inasmuch, as they were reserved expressly by the word "rents" in the saving clause, there being no other rents, to which that word could relate. And, there being a reservation of rents to the lord, the right to the mines them-

selves (out of which the rent issued) would also be reserved to him. Besides, there were other words in the saving clause, which were sufficiently comprehensive to reserve the right of digging for mines, such as seignories and royalties. If, therefore, the mines had been intended to have been taken out of the lord, there should have been express words for that purpose.

Lord *Kenyon* Chief Justice.— “ I agree that private
 “ acts of parliament are to be construed according to
 “ the intention of the parties ; but then, that inten-
 “ tion must be collected from the words used by the
 “ Legislature, without doing violence to their natural
 “ meaning. The defendant’s counsel has supposed,
 “ that mines are a distinct right from the right to the
 “ soil : but I do not think so, where they are under the
 “ soil of the lord of the manor. In cases of copy-
 “ holds, a lord may have a right under the soil of the
 “ copyholder : but, where the soil is in the lord, all
 “ is resolvable into the ownership of the soil ; and a
 “ grant of the soil will pass every thing under it. The
 “ only word in the saving clause, which affords any
 “ ground for argument, is the word “ *rents* ;” but,
 “ when we see how that word is used with the others
 “ in that part of the act, it cannot be taken to include
 “ mines. At the time of passing this act of parlia-
 “ ment, the mines under the waste ground were in
 “ the lady of the manor, as part of the demesnes :
 “ she intended to give up several rights to the tenants,
 “ for which she has reserved a satisfaction. Then,
 “ how do the tenants hold their allotments under the
 “ act ? They could not take as copyholders, unless
 “ the

“ the act of parliament had so directed ; but they take
 “ their allotments as freehold estates of inheritance.
 “ It is extremely clear, that no new tenure can be
 “ created, unless by the authority of parliament,
 “ since the statute of *quia emptores* ; nor can any per-
 “ son reserve to himself a right of escheat. Then it
 “ was urged by the defendant’s counsel, that the act
 “ of parliament could not affect the lease, which was
 “ in existence when it passed : it certainly would not ;
 “ neither would it have been affected, if the lady had
 “ sold her estate in the manor, but the alienee would
 “ have become the landlord, and entitled to the be-
 “ neficial interest reserved by the lease : so, here the
 “ lease will remain valid, but the right to the rent of
 “ the mines will pass to the person, in whose favour
 “ the allotment was made under the act. For we can-
 “ not narrow the words of this act ; and that transfers
 “ all the right in the soil to the several tenants. There
 “ is no doubt, but that the mines might have been
 “ reserved. If it had been so intended, it would have
 “ been by express words ; but there is no such reser-
 “ vation here. The word “ *rents* ” is explained by
 “ the other words used ; but those rights, which are
 “ reserved, are mere badges of royalty, incorporeal
 “ rights, and other fruits of tenure of the like sort.”

Asbursft Justice.— “ It does not appear to me, that
 “ mines were intended to be reserved to the lady of
 “ the manor. The object of an inclosure is, that the
 “ lord of the manor, in respect of his seignory and
 “ waste, should have some part of the ground, to be
 “ allotted to himself in lieu of his manerial rights ;

“ and the other lands are allotted to the proprietors of
 “ the other inclosed lands within the manor ; and these
 “ are not made copyholds, but the grantees take them
 “ as freeholds of inheritance. Therefore, *prima facie*,
 “ they are entitled to all mines, &c. belonging to the
 “ land. Then, what is there in this case to take them
 “ out of the grantees, and vest them in the lord ?
 “ The saving clause only amounts to what, perhaps,
 “ the law would otherwise have reserved without such
 “ a clause ; for, as the rights reserved are of an in-
 “ corporeal nature, they would still have remained in
 “ the lady, because there is nothing in the act to divest
 “ her ; but they have nothing to do with the soil or
 “ freehold, in which mines are included.”

Buller Justice.— “ The general object of this inclo-
 “ sure act was, to extinguish all the antecedent rights
 “ of the several parties interested, and to create others
 “ in lieu of them ; in doing which, it was thought
 “ right to make particular exceptions. Now, when
 “ the Legislature have made some exceptions, we can-
 “ not imply others which they have not made. As to
 “ the lease, which did not expire till a year after the
 “ act passed, it probably was not thought of by either
 “ party at the time ; the mine had not been worked
 “ since the year 1759 ; it was, perhaps, therefore
 “ abandoned, and not thought to be of any value for
 “ the short remainder of the term. However, the
 “ court cannot carry the exception beyond the words
 “ of the act ; and all the reservations are of incor-
 “ poreal rights. By the general words, the soil passed
 “ by the allotments to the several proprietors ; and

“ mines are considered as part of the soil. I do not
 “ agree with the defendant’s counsel, that the lord may,
 “ unless restrained by custom, dig for mines on the
 “ copyholder’s lands : but it is not necessary to con-
 “ sider that question here.”

Grose, Justice.— “ It is extremely dangerous to con-
 “ strue either deeds or acts of parliament according to
 “ supposition. The question here is, whether, under
 “ this act of parliament, the mines passed to the te-
 “ nants ? The soil undoubtedly passed ; now, what
 “ are the mines but part of the soil ? And every
 “ thing, which was intended to be reserved to the lady
 “ of the manor, is expressed ; and all those rights are
 “ incorporeal hereditaments, and not like mines.
 “ Then, not only the general words, under which the
 “ allotments were made, are large enough to carry
 “ mines, but the subsequent exception is not broad
 “ enough to save them. At the same time, it is rather
 “ extraordinary, that so valuable a part of the pro-
 “ perty as mines, should not have been expressly re-
 “ served to the lady of the manor, if it had been so
 “ intended.”

§ 43. With respect to the general saving clause, which is inserted in every private act of parliament, difficulties have arisen on the construction of it, where it is contradictory to the body of the act. It is laid down in the case of *Alton Woods*, that a saving in an act of parliament, which is repugnant to the body of the act, is void ; as in *Plowden* 565, where the supposed attainder of the Duke of *Norfolk* was, by act of parliament

Effect of the
General Sav-
ing.

1 Rep. 47 a.

1 *Mary*, declared to be void *ab initio*, saving the estates and leases made by King *Edward* 6th. The saving was held to be void: for, where the attainder was declared to be void, the saving was against the body of the act, and therefore void.

§ 44. This doctrine appears to have been supported in modern times; it being held, that the general saving clause in a private act of parliament will not control the provisions, contained in the body of the act, but must be so expounded as to be rendered consistent with the body of the act, or else be void.

Wood v.
Cecil,
2 Vern. 711.

§ 45. A private act of parliament was obtained for sale of Lord *Stawell's* estate, by which it was enacted, that the estate should be vested in trustees to be sold; and that the money, arising from the sale, should be, in the first place, applied to pay the mortgagees, and afterwards to pay the creditors by statutes, judgements, and recognizances. And, at the close of the act, there was a general saving of the rights of all persons except the heir at law, and others of Lord *Stawell's* family. Several of the statutes and judgments were prior to some of the mortgages; and, there being a decree for sale and execution of the trust created by the act, a question arose upon a special report, whether the mortgagees should be paid in the first place, or whether the creditors by statutes, judgements, and recognizances, should be let in according to their priority, or be postponed to the mortgagees.

For

For the creditors by statutes, judgements, and recognizances, it was insisted that their securities bound the land, as well as the mortgages : they were, both in law and equity, to be considered as having a prior right to the subsequent mortgagees. And, although in the beginning of the act it was provided, that the mortgagees should be paid in the first place ; yet there was a general saving of the rights of all persons, except the heir at law, and those of Lord *Stawell's* family ; and that saving set the matter at large again, and restored them to their priority.

Lord Chancellor.—“ The act expressly provides,
 “ that the mortgages shall be paid in the first place,
 “ and the general saving must not control the express
 “ provision of the act, but must be so expounded as
 “ to consist with the express preference given to the
 “ mortgagees : and he must decree the execution of
 “ the trust accordingly, but seemed to admit that, by
 “ virtue of the general saving in the act, they might
 “ make use of their incumbrances as they could at
 “ law.”

§ 46. In the case of *Westby v. Kiernan*, which has already been stated, the right of the remainder-man, *Ante f. 37.* expectant on the determination of the estate tail, was saved, not being excepted in the general saving : and yet he was held to be barred ; for otherwise the act of parliament would have been nugatory.

§ 47. Where the enacting part of an act of parliament, for inclosing the wastes and commons of a
 8 manor,

manor, expressly exonerates certain lands from the payment of tithes, the rector will be barred from claiming tithes out of these lands, though he is comprehended in the saving clause of the act.

Riddle v.
White,
4 Gwill. 1387.

§ 48. By an act of parliament made in 13 *Geo. 3.*, for inclosing and dividing certain moors, commons, or tracts of waste lands, within the parish and manor of *Lanchester*; it was enacted, that the commissioners therein named, should, after setting out thirty acres of the said land to the curate of *Latley*, and other portions of land for the purposes therein mentioned, let out the residue of the said land (except so much thereof as was therein-after directed to be sold for defraying the expences of obtaining the said act, and other purposes therein mentioned), unto and amongst the bishop of *Durham*, who was the lord of the said manor, and the several other persons having rights of common thereon, according to the value of their respective estates to which such rights of common belonged; and that all such lands, as should be allotted to any persons in respect of their respective lands and tenements, should be held by them in the same manner as their respective messuages, &c. in right of which such allotments were holden respectively, and subject to the same species of tithes only, in the same manner, and to the same persons, as they were accustomed to pay.

And it was by the same act declared, that the said commissioners might sell so much of the said moors or commons as they should think fit, to raise money to
pay

pay the expences attending the obtaining and executing the act, and the expence of dividing the said moors and commons, and the expence of setting out and making public highways, roads, bridges, and drains, appointed by the act to be set out, and the expence of inclosing and fencing the allotments, before directed to be made to the curate of *Latley*;
 “ And it was by the said act declared, that the
 “ persons, who should become *purchasers* of the said
 “ lands so to be sold, *should hold the same discharged*
 “ *from the payment of all manner of tithes*, and other
 “ estates, rights, and duties whatsoever, to any person
 “ or persons politic or corporate.”

And in the said act was a clause in the words following :—“ Saving always to the King’s most excellent majesty, his heirs and successors, and to all and
 “ every other person and persons, politic or corporate,
 “ his, her, and their successors, executors, and administrators,, (other than the lord of the manor of
 “ *Lanchester* aforesaid, and all other persons entitled
 “ to a right of common in or upon the said moors
 “ or commons, his, her, and their heirs, successors,
 “ executors or administrators respectively; and the
 “ person or persons, bodies politic or corporate, his,
 “ her, and their heirs, successors, executors and administrators, who shall by virtue of this act make
 “ any claim, affecting the boundaries of the said
 “ moors or commons, or any claim of any right of
 “ common thereon, which shall be adjudged and determined against him, her, or them, as aforesaid),
 “ all such right, title, and interest, as they, every or
 “ any

“ any of them had or enjoyed, of, in, to, or out of
 “ the said moors or commons, hereby directed to be
 “ divided and inclosed as aforesaid, or could, or
 “ might, or ought to have had or enjoyed, in case
 “ this act had not been made.”

“ And be it further enacted, that this act shall be
 “ deemed and taken to be a *public* act, and shall be
 “ judicially taken notice of as such, by all judges and
 “ justices, and other persons whomsoever, without
 “ specially pleading the same.”

The impropiator of the parish of *Lanchester*, some years after this act, filed his bill in the Exchequer against certain occupiers of land in the parish; stating, that the commissioners under this bill had caused twelve plots of land to be sold, to raise money for defraying the expences of the bill; that the defendants, who were purchasers thereof, immediately improved their lands, and converted them into arable ground. That the plaintiff, to prevent any doubt which might arise whether the said lands were to be considered as barren land, and as such exempt from
 Tit. 22. f. 61. the payment of tithes during seven years, had not during that time required any tithes to be paid to him.

That the defendants had, during the preceding years, been the occupiers of the lands which had been so sold, and had grown upon them great quantities of wheat, &c.; and requiring a discovery of the tithes which had arisen during those years, and praying an
 account

account of such tithes, and that the defendants might be decreed to pay the amount thereof to the plaintiff.

To this bill the defendants demurred ; for that it appeared by the bill, that the lands, which were in the defendants occupation, were freed and discharged from the payment of all manner of tithes by the said act of 13 Geo. 3.

In support of the demurrer, it was contended :
1st, That the plaintiff's right, as impropriator, was not saved by the saving clause in the act : that it was clear it was not saved by the words of that clause, because it saves only rights, of, in, to, or out of the moors or commons, and a right to tithes is not a right of, in, to, or out of land, but is a right of something collateral to the land. That tithes are an ecclesiastical inheritance, collateral to the estate of the lands, and of their proper nature due only to ecclesiastical persons by the ecclesiastical law.

2d, That the impropriator's right not only was not saved by the saving clause, but that it did not appear to be the intention of the legislature to save it ; because it was highly reasonable that the impropriator, who derived great benefit from this act (by which the lands, out of which the tithes arose, were rendered much more profitable than they were before) should bear his proportion of the expence of the act being passed. That, by the lands, which were sold to raise money for paying the expence of this act, being exempted
from

from tithes, the impropriator bore his just proportion of the expence, but nothing more.

3d, That if, however, the words of the saving clause did extend to the impropriator, and it could be supposed that the legislature intended by that clause to save his right, yet the clause was void; because it was repugnant to the body of the act, which expressly declares, that the lands to be sold shall be discharged from the payment of tithes: that the decisions of courts of justice, with respect to private acts of parliament, were exactly the same as with respect to deeds, and in a grant every exception, which is repugnant to the grant, is void. That this, however, was a public act; and every clause in an act of parliament, repugnant to the body of the act, is void.

4th, That it would be very hard on the defendants, if they were compelled to pay tithes for lands, which they had purchased upon the faith of an act of parliament, declaring that they were discharged of tithes.

On the other hand, it was insisted for the plaintiff, that this act of parliament was to be considered as a public act, only for the purpose of being judicially taken notice of by the judges, without being specially pleaded, and for no other purpose whatsoever. That acts of this kind, though declared for the special purpose mentioned in them to be public acts, are never kept in the parliament roll, are never printed among the statutes; and do not receive the royal assent in the same words by which public acts receive it

it—" *Le roi le veult ;*"—but in the words by which private acts receive the royal assent,—"*Soit fait, comme il est désiré :*" that they were, in fact, to be considered as parliamentary conveyances, and not as public statutes, which concern all the King's subjects.

That the saving clause was not void ; though it was repugnant to the body of the act ; because it was of the very nature of a saving clause, that it should be repugnant to the body of the act, the object of it being to control every thing in the act, as far as it affected the interests of persons not parties to the act. That, if saving clauses were not to be so considered, they were useless ; because, if the rights of the parties were not expressly disposed of by the act, they would be saved to them even though there were no saving clause ; as, if here the act had not declared that the lands should be discharged of tithes, the impropriator would have been intitled to tithes, though there had been no saving clause. A saving clause may have an operation, though not expressly repugnant to the body of the act ; as if it had been declared in this case that the land should be freed from all charges, without mentioning tithes, and then there had been a clause, saving the right of the impropriator. That the cases of grants were totally unlike the present : for the reason, why an exception contrary to the words of the grant is void, is, because the words of the grant are to be taken most strongly against the grantor.

Lord Chief Baron :—" Without going into an elaborate argument on this case, it is sufficient to say,
" that

Ante f. 45.

“ that it falls within all the principles of a contradic-
 “ tion between a saving and an enacting clause in an
 “ act of parliament ; and that the case is exactly the
 “ same as that of the Duke of *Norfolk*, as *Alton*
 “ *Wood*’s case, and the case in *Vernon*. The legisla-
 “ ture takes upon itself to alter entirely the mode of
 “ tithing all the lands, which are to be the subject of
 “ the inclosure. It is impossible to say, that the
 “ rector is intitled to his tithes of the land in ques-
 “ tion, without saying that he would have it in his
 “ power to defeat all the purposes of the act, which
 “ the legislature never could intend. This case is, in
 “ point of principle, precisely the same as the case in
 “ *Vernon*. In private acts, in general, the legislature
 “ does nothing more than enable persons to enter
 “ into a contract, who could not otherwise enter into
 “ it : and the persons, who are parties to the act, are
 “ expressly named in it ; but here the legislature does
 “ a great deal more : it takes on itself to act on the
 “ land itself, to declare that it shall be discharged of
 “ tithes. Accordingly, therefore, to the principle of
 “ the decided cases, and indeed of common sense,
 “ we think that the rector cannot claim his tithes
 “ against the express words of the act of parliament ;
 “ and that the demurrer must be allowed.”

A private
 Act may be
 relieved
 against.

§ 49. A private act of parliament appears to have
 been formerly considered as an assurance of so high a
 nature, that, although it was obtained by fraud, it could
 not be relieved against by any of the courts of law or
 equity, but only by the power that made it ; that is,
 by parliament. And Mr. *Booth*, in the opinion which
 has

has been mentioned, lays it down, that inferior jurisdictions are as much bound to submit to a private act of parliament, as the meanest subject; provided the record is right. They may expound or explain, keeping to the intention of the makers, but not question or impeach, what the legislature has thought fit to enact, as an act of parliament. If there is any grievance or irregularity, that must and can be remedied or rectified only by another act of parliament.

Ante f. 35.

§ 50. Sir *William Blackstone* has, however, said, that a private act of parliament hath been relieved against when obtained upon fraudulent suggestions; and has cited two cases in support of this assertion.

2 Comm. 346.
Hargrave's
Jur. Argum.
vol. 2. 392.

The first of these is *Richardson v. Hamilton*, in which the Court of Chancery set aside an act of the House of Assembly of *Pensylvania*: it may be seen in the *Book of Decrees* for the year 1732, pa. 344. at the Report Office of the Court of Chancery.

§ 51. The second is a case determined by the House of Lords, on an appeal from the Court of Sessions in *Scotland*, which I shall state from the printed cases.

Sir *James M'Kenzie* being tenant in tail of an estate in *Scotland*, called *Roystoun*, with the concurrence of his only son *George*, and of his nephew Sir *George M'Kenzie*, the two first remainder-men, obtained an act of parliament to sell the estate for payment of debts.

M'Kenzie v.
Stuart,
Dom. Proc.
1754.

Sir *James M'Kenzie* sold the estate, and prevailed upon his son and nephew to consent, that the whole purchase money should be paid to him without account, in consideration of his laying out 1000*l.* thereof to the uses of the entail; and an agreement, dated the 17th of *August* 1739, was entered into for that purpose.

It was afterwards discovered, that there were two debts, stated in the act of parliament and the agreement of 17th *August*, as charges on the estate tail, which were in fact fictitious and fraudulent; in consequence of which Sir *George M'Kenzie*, who became entitled to the estate tail, by the death of Sir *James M'Kenzie* and his son *George*, brought an action in the Court of Sessions against the representatives of Sir *James* and the trustees of the act of parliament, for an application of the residue of the purchase money, after payment of the just, true, and lawful debts, really affecting the entail, and for an account of what payments had been made. It was objected that Sir *George* was, by the agreement of the 17th *August*, barred from calling for such an account.

The Lord Ordinary, by an interlocutor of the 20th *January* 1747, found that “ Sir *George* was not barred
 “ by the agreement from objecting to the debts, or
 “ from proving the same to be fictitious, and not real
 “ debts affecting the estate of *Roytoun* at the time of
 “ the sale;” and granted warrants for letters of incident diligence, for recovering the grounds and instructions of the said debts.

The representatives of Sir *James M'Kenzie* pleaded, that the act of parliament, by reciting these debts as subsisting and as charges upon the entailed estate, established them as such, was final, and excluded all examination on that head. To this it was answered, that, as to the purchaser of the estate and all claiming under him, the act was final and conclusive; but, with respect to the debts, it left them as they were. That the act supposed them really and *bonâ fide* due to third persons, who would therefore have right to the purchase money, but if paid, never meant them to be paid a second time, nor Sir *James M'Kenzie* under a pretence thereof to appropriate to himself the money for discharge of debts, which were either fictitious, or could not from their nature affect the intail. And that, whether he had or had not done so, was a question no ways affected by the act. The interlocutor of the ordinary was reversed in the Court of Sessions.

Upon an appeal to the House of Lords it was contended, that the recital of the debts in the act was all the information and suggestion of the parties. The enacting part, so far as it directed the discharge of those incumbrances out of the purchase money, only pursued the recital; which, if ill-founded from the mis-information of the parties, was not conclusive: and, though the appellant, by having given his consent to the act, might be thought concluded, yet being drawn into such contract by Sir *James M'Kenzie's* misrepresentation of the true state of the debts, who misled both the remainder-men and the legislature,

he had a right as against Sir *James's* representative, to inquire into the reality of the debts, and application of the purchase-money. Nor could a consent, thus fraudulently obtained, any more stand in the way of the relief he sought, than it would in case of an ordinary transaction.

On the other side it was insisted, that the debts and incumbrances specified in the act of parliament must be taken as they were recited, between the parties to the act : for, though a saving clause was inserted for the rights of those, who were not parties ; yet it was a binding law to those who were. The act directed the money, arising by the sale of the lands and barony of *Roxstoun*, to be applied in payment of the debts (the amount of which was particularly stated) ; and the surplus only was to be laid out in the purchase of land to be settled in the order and course of succession provided by the entail.

The House of Lords ordered, that the interlocutor, complained of in the appeal, should be reversed ; and that the interlocutor of the Lord Ordinary, of the 20th *January*, should be affirmed : and ordered that the Court of Sessions should proceed thereupon, according to justice and the rules of that court.

§ 52. The doctrine laid down by Sir *William Blackstone*, has been fully confirmed by the following modern case, in which the Court of Chancery relieved against the express words of a private act of parliament.

§ 53. *Simon Biddulph*, by his will, made in 1730, devised his real estates, which he had charged with the payment of several sums of money, to trustees, upon trust to raise and pay all such debts as he should owe at the time of his decease, or so much thereof as his personal estate should not extend to pay, and to settle and assure the residue to his grandson *Theophilus Biddulph*, for life, without impeachment of waste, remainder to his first and other sons successively in tail, with several remainders over.

Biddulph v. Biddulph,
Report Office,
Book A.
1790. pa.
269.

Simon Biddulph died in 1736, leaving the said *Theophilus Biddulph* his heir at law, who entered into possession under the will of *Simon Biddulph*, of all the estates whereof he died seised in possession, and upon the death of Sir *Theophilus Biddulph* of *Lapley*, in 1743, he became a baronet, and entered into possession of other estates, whereof *Simon Biddulph* had the reversion, expectant on the death of Sir *Theophilus Biddulph* of *Lapley*, which were of considerable value, and charged with the payment of several sums of money, but the rents thereof were sufficient to keep down the interest of the incumbrances affecting the same.

By a private act of parliament passed 27 Geo. 2. intituled “An act for the sale of the settled estates of
“ Sir *Theophilus Biddulph*, Bart. in the county of
“ *Stafford*, &c. for raising money to discharge incum-
“ brances affecting the same, and for laying out the
“ surplus in the purchase of other lands to be settled
“ to the uses therein mentioned.” After reciting the

several incumbrances on the said estates, and that the said Sir *Theophilus Biddulph* had, out of his own money, raised and paid off 2819 *l.* 4 *s.* or thereabouts, being the deficiency of the personal estate of *Simon Biddulph*, in the discharge of the remainder of his debts, which remained due to the said Sir *Theophilus Biddulph*, and charged on the settled estates, with a considerable arrear of interest. And reciting that it would be for the benefit and advantage of Sir *Theophilus Biddulph*, and of all the persons claiming under the will of *Simon Biddulph*, if the incumbrances affecting the settled estates, which carried a high interest, were paid off and discharged, which could only be done by sale of part of the settled estates, and therefore the said Sir *Thomas Biddulph*, and all the persons claiming under the will of the said *Simon*, were desirous and had agreed that certain parts of the estates should be sold for that purpose, freed and discharged from the said incumbrances, and that the surplus of the money after payment of the incumbrances, should be laid out in the purchase of other lands, more contiguous to the estate, to be settled to the uses of the will of *Simon Biddulph*. It was therefore enacted, that the said estates should be vested in trustees, their heirs and assigns, free from the trusts therein mentioned, in trust, with the consent of Sir *Theophilus Biddulph*, to sell the same, and to apply the money in payment of the incumbrances, and all interest which should be then due and owing for the same, and also in payment of the said sum of 2819 *l.* 4 *s.* due to Sir *Theophilus Biddulph*, together with all interest that should have accrued due for the same to the time of the payment thereof.

And

And to lay out the remainder of the money in the purchase of lands, to be settled to the uses of *Simon Biddulph's* will.

The trustees who were named in the act of parliament did not act, and new trustees were appointed. *Sir Theophilus Biddulph* himself sold the estates and paid off the incumbrances, and also paid, or took credit to himself, for what was due on account of interest, and laid out the residue in the purchase of lands, which he settled to the old uses.

Theophilus Biddulph, the eldest son of *Sir Theophilus*, filed his bill in Chancery against his father and the trustees, stating the above facts, and that there remained a balance in the hands of the trustees of 7207 *l.* which had not been invested in the purchase of lands, according to the directions in the act : and the plaintiff being entitled to an estate tail expectant on the estate for life of his father in the lands to be purchased, he prayed that the said sum of 7207 *l.* might be laid out in the purchase of lands to be settled to the old uses.

Sir Theophilus Biddulph, by his answer, admitted that he, acting for the trustees in the act; did, out of the money arising from the sale of the estates which were sold under the act, pay and apply, not only so much as was necessary to discharge the incumbrances affecting the estates, but also all such interest as was due and owing on the said incumbrances at the respective times when the same were paid off, namely, as well such interest as was due and owing on the said incumbrances

at the time when the defendant came into possession of the estates, as what had afterwards accrued, the same being directed by the act; and submitted, that such payments of interest were respectively made, as being directed by the act, and that there being such directions in the act for payment of all the interest, the defendant, as tenant for life, was not bound to keep down the interest of the incumbrances, from the time he came into possession of the estates; and that the act of parliament was not a fraud on the plaintiff and the persons interested in the estates, and that the defendant ought not to make a compensation for such interest, as required by the plaintiff's bill; but admitted, that the rents and profits of the estates which were charged with the said incumbrances, were more than sufficient to answer the interest of the incumbrances, and said he did not, in suing for and obtaining the act of parliament, intend any fraud on any of the persons who were to become interested in the said estates after him; and said, that the interest which accrued after he came into the possession of the said estates amounted to 7207 *l.*; and stated the sums of money paid and laid out in lands, and said there did not remain any money to be invested in land, all the money having been fully and properly applied pursuant to the directions of the act; and submitted, that he was not compellable to make any compensation for such trust monies. Whereupon, and upon hearing counsel upon both sides, and it being admitted, that the said sum of 7207 *l.* was received by the said Sir *Theophilus Biddulph*, for rents and profits of the estates in question of which he was tenant for life, and which ought to have been applied in

in keeping down the interest of the incumbrances affecting the said estates ; and it being admitted, that all the expences of the act, and all the expences anterior to the money being laid out in land, had been paid, it was ordered and decreed, that the defendant Sir *Theophilus Biddulph* should pay the sum of 7207 *l.* into the bank in the name of the accountant-general, in trust in the cause, to be laid out in the purchase of lands, agreeable to the act of parliament *.

§ 54. The House of Lords has, from time to time, made the following standing orders respecting private acts :

Standing
Orders of the
House of
Lords.

That, for the future, it be a general instruction to all committees who shall meet upon private bills, that they take no notice of the consent of any person to the passing of such bill, unless such person appear before them, or there be an affidavit of two persons made, that he or she is not able to attend, and doth consent to the said bill. And that, when any committee shall be appointed on a private bill, notice thereof be affixed on the doors of this house, 14 days before the meeting of the said committee.

20th April
1698.

That, for the future, no private bill shall be brought into this house, until the house be informed of the matters therein contained, by petition to this house for leave to bring in such bill.

7th Dec.
1699.

* No Report of this Case is to be found, either in *Mr. Brown* or *Mr. Vesey junior*.

That,

16th Nov.
1705.

That, for the future, no private bills shall be read a second time, until printed copies thereof be left with the clerk of the parliaments, for the perusal of the House of Lords. And that one of the said copies shall be delivered to every person, as shall be concerned in the said bill, before the meeting of the committee upon such bill; and, in case of infancy, to be delivered to the guardian or next relation of full age, not concerned in interest, or in the passing the said bill.

16th Feb.
1705.

That, for the future, all parties concerned in the consequences of any private bill, shall sign the petition that desires leave to bring such private bill into this house.

That, when a petition for a private bill shall be offered to this house, it shall be referred to two of the judges, who are forthwith to summon all parties before them who may be concerned in the bill; and, after hearing all the parties, and perusing the bill, are to report to the house the state of the case, and their private opinion upon under their hands, and are to sign the said bill: the same method to be observed as to private bills that are brought up from the House of Commons, before the second reading of such bills, by sending a copy of the said bill, signed by the clerk, to the judges.

That, in all cases, where trustees shall be appointed by any private bill, the committee, to whom that bill is referred, do take care that the trustees appear personally before them, and accept the trust under their hands;

hands ; and also, that the Lord, who shall be in the chair of a committee for the passing of any private bills, when he makes his report, shall acquaint the house that all the orders of the house, in relation to private bills, were duly observed in the passing the said bill through the committee.

That, for the future, when any private bill shall be sent by the house to a committee, there shall be at the same time transmitted to them a copy of these orders now made, and of all other standing orders of the house then in force relating to the passing of private bills.

That, upon the reference of any private bill to the judges as aforesaid, the judges to whom the same bill shall be referred, shall send to this house a list or lists of such persons names as are to be sworn in relation to such bill ; and that they shall be thereupon sworn at the bar of this house, in order to be examined by the judges upon such oath, in relation to the bill before them.

18th Dec.
1706.

That, on all reports made from committees of amendments to bills, for the future, the Lord that makes the report, do explain to the house the effect and coherence of each amendment ; and that, on the clerk's second reading of the same amendments, the Lord on the woolfack do the same.

5th April
1707.

That, where a bill is brought in to empower any person to sell or dispose of lands in one place, and to
buy

19th May
1762.

buy or settle lands in another place, the committee, to whom such bill shall be referred, do take care that the values be fully made out; and, if the bill shall not be for making a new purchase, but only for settling other lands in lieu of those to be sold, in that case, provision shall be made in the bill, that such other lands be settled accordingly. But, if the bill shall be to purchase and settle other lands, in that case, the committee are to take care, that there be a binding agreement produced for such new purchase: or, if it shall be made appear to the committee, that such agreement cannot then be made, or that such purchase cannot then be made and settled, as desired by the bill, and the committee shall be satisfied with the reason alledged for either of those purposes in either of those cases, provision shall be made in the bill, that so much of the money arising by the sale of the lands directed to be sold, as is to be laid out in a new purchase, shall be paid by the purchaser or purchasers, into the Bank of *England*, in the name and with the privity of the accountant-general of the High Court of Chancery, to be placed to his account there, *ex parte* the purchaser or purchasers of the estate of the person or persons mentioned in the title of the said bill, pursuant to the method prescribed in the act of 12 *Geo.* 1. c. 32., and the general orders of the said court, and without fee or reward, according to the act of 12 *Geo.* 2. c. 24.; and shall, when so paid in, be laid out in the purchase of navy or victualling bills, or exchequer bills. And further, that the interest arising from the money so laid out in the purchase of navy or victualling bills, or exchequer bills, and the money received for the same, as they shall be respectively paid off by Government,

ment, shall be laid out in the name of the said accountant-general in the purchase of other navy or victualling bills, or exchequer bills. All which said navy and victualling bills, and exchequer bills, shall be deposited in the bank in the name of the said accountant-general, and shall there remain until a proper purchase or purchases be found and approved, as shall be directed by such bill, and until the same shall, upon a petition setting forth such approbation, to be preferred to the Court of Chancery in a summary way by the persons to be named in the bill, be ordered to be sold by the said accountant-general, for the completing such purchase, in such manner as the said court shall think just, and direct. And further, that if the money arising by the sale of such navy, victualling, or exchequer bills, shall exceed the amount of the original purchase-money so laid out as aforesaid, then, and in that case only, the surplus which shall remain, after discharging the expence of the applications to the court, shall be paid to such person or persons respectively, as would have been entitled to receive the rents and profits of the lands directed to be purchased, in case the same had been purchased pursuant to the act, or to the representatives of such person.

That, where a petitioner for a private bill is tenant for life in possession, and another petitioner for the same bill is tenant in tail in remainder, and of age, and where it is competent for the two together, by deed, fine, and common recovery, to bar the rights and interests of all persons in remainder, after the estate in tail of the petitioner, the committee shall not, in such case, be required to take the consent of any of the persons

29th April
1799.

persons in remainder, after the estate of such tenant in tail, to the passing of such bill.

That, in all private bills, when any married or unmarried woman, or when any widow desires to consent to the sale or exchange of any estate, in which she may have an interest, or upon which she may be entitled to a jointure or rent-charge of any sort, or if she shall desire to sell or otherwise dispose of all or any part of such jointure, rent-charge, or interest, the committee shall require not only her own consent in person, but also that of her trustee or trustees.

That, in all private bills, when any estate is proposed to be sold or exchanged, on which the whole, or any part of the fortune of any child or children is secured, or in which any such child or children hath or have an interest, the committee shall take the consent of any such child or children, if he, she, or they, is or are under age, by his, her, or their parents or guardians; and if of age, then the consent of the trustee or trustees for such child or children shall also be taken, as well as the personal consent of such party.

That the consent of all trustees shall be required in person before the committee, where any money is to pass through the hands of any such trustees, whether for jointure, pin-money, the fortunes of younger children, or any other interest whatsoever; but the consent of trustees to preserve contingent remainders only, shall not be necessary.

That,

That, when any of the parties interested in any private bill, shall have power by such bill to name a trustee in the room of any trustee dying, resigning, or refusing to exercise his trust, provision shall be made in the bill that such new trustee shall be appointed by or with the approbation of the Court of Chancery.

That, when a petition shall be presented to the house for any private bill, notice shall be given to any person being a mortgagee upon the estate intended to be affected by such bill.

That, in any private bill for exchanging an estate in settlement, and substituting another estate in lieu thereof, there shall be annexed to such bill a schedule or schedules of such respective estates, shewing the annual rent and the annual value thereof, and also of the value of the timber growing thereupon; and in all private bills for selling a settled estate, and purchasing another estate to be settled to the same uses, there shall be annexed to such bill a schedule or schedules, specifying the annual rent thereof; and that every such schedule shall be signed and proved upon oath by a surveyor or other competent person, before the committee to whom such bill shall be referred.

That the Lord who shall be in the chair of a committee to whom any private bill shall be committed, shall state to the house, when the report from such committee is made, how far the orders of the house, in relation to such private bill have, or have not, been duly complied with.

As to Bills
relative to
Estates in
Ireland.

9th Dec.
1801.

§ 55. The following standing orders were made by the House of Lords, in consequence of the Union with *Ireland*.

That, for the future, when a petition for a private bill concerning estates in land situated in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, shall be offered to this house, it shall be referred, if the parties desire it, to two judges of the Court of King's Bench, Common Pleas, or Exchequer in *Ireland*, who are forthwith to summon all parties before them, who are concerned in the bill; and, after hearing all the parties, and perusing the bill, are to report to the house the state of the case, and their opinion thereupon, and are to sign the said bill. The same method is to be observed as to private bills concerning estates in land, situated in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, brought from the House of Commons, before the second reading of such bill, by sending a copy of the said bill, signed by the clerk, to the chief judges aforesaid, or any two of them.

That all persons concerned in the consequences of such private bills as aforesaid, and who reside in that part of the United Kingdom of *Great Britain* and *Ireland* called *Ireland*, may give their consent to the passing of such bills before the two judges to whom such bills shall be referred; and the certificate of the said judges, or any two of them, by which it shall appear, that on a day and at a place to be therein expressed, such person or persons did appear personally

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before

before them, and, being aware of the interest they may have in such bill, did give his, her, or their consent for him or themselves, and for those for whom, according to law, he, she, or they may be entitled to consent, and did accept the trust proposed to be vested in him or them by the said bill, and did in their presence sign a bill, (which bill, together with the said certificate, must be produced), shall be held as sufficient evidence of the consent of such person or persons before any committee of this house, to whom the consideration of such bill may be referred.

That it be a general instruction to the judges, who shall meet to take the consent of all persons concerned in the consequences of private bills relating to estates in that part of the United Kingdom called *Ireland*, that they take no notice of the consent of any person to the passing of such bill, unless such person appear before them, or it be made manifest to them by an instrument under the hand of a notary public, duly executed according to the forms required by law, that he or she is not able to attend, and doth consent to such bill.

That, where a bill is brought in to empower any person to sell or dispose of lands in one place in that part of the United Kingdom called *Ireland*, and to buy or settle lands in another place in the said part of the United Kingdom called *Ireland*, the committee, to whom such bill shall be referred, do take care that the values be fully made out; and, if the bill shall not be for making a new purchase, but only for settling other lands in lieu of those to be sold, in that case, provision shall

be made in the bill, that such other lands be settled accordingly ; but, if the bill shall be to purchase and settle other lands, in that case, the committee are to take care that there be a binding agreement produced for such new purchase : or, if it shall be made appear to the committee, that such agreement cannot then be made, or that such purchase cannot then be made and settled as desired by the bill, and the committee shall be satisfied with the reasons alleged for either of those purposes, in either of those cases, provision shall be made in the bill, that so much of the money arising by sale of the lands directed to be sold, as is to be laid out in a new purchase, shall be paid by the purchaser or purchasers, without fee or reward, into the bank of *Dublin*, under the direction and by the authority of the Court of Chancery, and in the name of the trustees named in the act, and shall, when so paid in, produce the highest interest that can be obtained for the same ; and that the interest arising from the money so paid in, shall be laid out in the name of the said trustees, and shall annually accumulate and be added to the principal sum itself, to carry interest together, until a proper purchase can be found and approved, as shall be directed by such bill ; and, until the same shall, upon a petition setting forth such approbation, to be preferred to the said Court of Chancery in a summary way by the persons to be named in the bill, be ordered to be paid by the treasurer of the bank of *Dublin* for the completing such purchase, in such manner as the said court shall think just and direct : and, if the money arising by the principal and accumulated interest of such sum or sums shall exceed the
amount

amount of the original purchase money so laid out as
aforesaid, then, and in that case only, the surplus which
shall remain after discharging the expence of the appli-
cations to the court, shall be paid to the person or per-
sons respectively, who would have been entitled to re-
ceive the rents and profits of the land directed to be
purchased, in case the same had been purchased pur-
suant to the act, or to the representatives of such per-
son or persons.

TITLE XXXIV.

King's Grants.

§ 1. *Nature of.*
 4. *Grants of Franchises.*
 5. *Of Offices.*
 6. *Of Crown Lands.*

7. *Of the King's private Pro-*
perty.
 8. *Construction of King's Grants.*

Section 1.

Nature of.

IT is a rule of the common law, that the King cannot grant any lands, tenements, or hereditaments, but by matter of record; and therefore the King's grants are contained in charters or letters patent, to which the great seal is annexed; and are usually directed or addressed by the King to all his subjects.

2 Comm. 346.

§ 2. All grants or letters patent, must first pass by bill, which is prepared by the King's attorney and solicitor general, in consequence of a warrant from the crown.

§ 3. It will only be necessary here to treat of those grants by which the crown gives something which falls within the description of real property, such as franchises, offices, and lands.

Grants of
 Franchises.
 Tit. 27.

§ 4. It has been stated that all franchises in the hands of private persons, are derived from grants by the crown, and the crown may still grant fairs, markets, parks, warrens, &c. though such grants are now seldom made.

§ 5. There

§ 5. There are a variety of offices held immediately under the crown, which can only be granted by letters patent; and it has been stated, that each of these offices must be granted with all its ancient rights and privileges, and every thing incidental to it. Of Offices.
Tit. 25. s. 11.

§ 6. By the common law, the King had an absolute power over all the crown lands, and might therefore have granted them in fee-simple. But the crown having been much impoverished by the liberality of former Kings, it was enacted by the statute 1 *Ann.* st. 1. c. 7. s. 5. that every grant, lease, or other assurance, which, from the 20th *March* 1702, should be made by her Majesty, her heirs, or successors, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches or vicarages only excepted,) should be void; unless such grant, &c. should be made for some term or estate not exceeding thirty-one years or three lives, or for some term of years determinable upon one, two, or three lives; and unless such grant, &c. be made to commence from the date or making thereof: and if such grant, &c. be made to take effect in reversion, that then the same, together with the estate in possession, do not exceed three lives or thirty-one years, in the whole: and unless such grant, &c. be so made that the tenant be liable to punishment for waste; and unless there be reserved upon every such grant, &c. the ancient or most usual rent, or more, or such rent as hath been reserved and paid for the greater part of twenty years before the making thereof; and, where no such rent shall have been reserved,

reserved, then a reasonable rent, not being under the third part of the clear yearly value of such manors, &c.; and unless such rents be made payable to her majesty, her heirs or successors, during the time of the continuance thereof.

By the 6th section, the crown is enabled to grant leases of buildings, wanting reparation, for fifty years or three lives, dispunishable for waste, and reserving rent as in the preceding section.

By the 8th section it is provided, that the crown shall not be disabled to make leases in pursuance of the stat. 12 *W.* 3. c. 13. by which the crown was enabled to make leases and copies of offices, lands, and hereditaments, part of the dutchy of *Cornwall*, or to make any grant or restitution of any estates forfeited for any treason or felony, or to grant, demise, or assign any lands, tenements, or hereditaments, seised upon any outlawry at the suit of a subject, or any estate taken in execution for any debt due to the crown, or any grants or admittances of any copyholds, parcel of any manor belonging to the crown. And by the stat. 34 *Geo.* 3. c. 75. several new regulations are established respecting grants and leases of crown lands.

Of the King's
private Pro-
perty.

§ 7. By the statute 39 & 40 *Geo.* 3. c. 88. it is enacted, that none of the provisions in the preceding acts shall extend to any manors, &c. purchased by his Majesty, his heirs or successors, out of monies from the privy purse, or with other monies not ap-

proriated to any public service, or to any manors, &c. coming to his Majesty, his heirs or successors, by gift or devise, or by descent from any of his, her, or their ancestors, or any other persons, not being kings or queens of this realm; and that this enactment shall operate from the birth of his Majesty.

By the 4th section of this statute it is enacted, that it shall be lawful for his Majesty, his heirs and successors, from time to time, by any instrument under his and their royal sign manual, attested by two or more witnesses, to grant all such manors, &c. to any person or persons, for any estate or estates, or for any intents or purposes, his Majesty, his heirs or successors, shall think fit, as any of his Majesty's subjects may like estates belonging to them.

§ 8. The King's grants are construed in a very different manner from conveyances made between private persons: for the King's grants being matter of record, ought to contain the utmost truth and certainty. And, as they chiefly proceed from the bounty of the crown, they have at all times been construed most favourably for the King, and against the grantee; contrary to the manner, in which all other assurances are construed.

Construction
of King's
Grants.

§ 9. In the case of a grant by a subject, every thing necessary to the enjoyment of the thing granted shall pass without express words; but a grant by the King shall not enure to any other intent than that, which is precisely expressed in the grant.

Tit. 32. c. 23.

Bro. Ab.
Tit. Patent,
pl. 62.

§ 10. By

§ 10. By the stat. *Prerogativa Regis*, 17 Edw. 2. c. 15. it is enacted, that, when the King gives or grants lands or manors, with the appurtenances, unless he makes express mention in the deed of knights' fees, advowsons of churches, and dowers, when they fall, then the King reserveth to himself such fees, &c. although among other persons it had been observed otherwise.

1 Rep. 40.

§ 11. Where the words "*ex certâ scientia, mero motu, et speciali gratiâ*," are inserted in the King's grants, they will then be construed liberally, and according to the apparent intent of the King.

6 Rep. 6 a.

§ 12. Where the King's grants are made upon a valuable consideration, they shall be construed favourably for the patentee, for the honour of the King and the relief of the subject.

END OF THE FOURTH VOLUME.

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